Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

JODIE SMOOK, Individually and on behalf of all other persons similarly situated,

Petitioners,

v.

MINNEHAHA COUNTY, SOUTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fourth Amendment prohibit a policy that in all instances requires a strip search of all juveniles brought to a juvenile detention facility without regard to individualized considerations, such as the individual's circumstances, the alleged offense, or whether individualized suspicion exists to believe that the juvenile is carrying or concealing weapons or contraband?

PARTIES TO THE PROCEEDING

The petitioners are Jodie Smook, individually and on behalf of the class of all persons who, when they were under the age of eighteen years, were charged with minor offenses from November 1, 1997 to a date to be set by the Court, or were charged with non-felony offenses from April 16, 1999 to a date to be set by the Court, and were, pursuant to Minnehaha County Juvenile Detention Center ("JDC") policy, strip searched at the JDC. The respondent is Minnehaha County, South Dakota.[1]

1. Individual defendants Jim Banbury, the former director of the JDC, and Todd Cheever, the current director, are not respondents to this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 457 F.3d 806 (8th Cir. 2006). Petitioners' Appendix ("App.") 1a-20a. The district court's orders (1) granting petitioners' motion for partial summary judgment and denying respondent's motion for summary judgment is reported at 340 F. Supp.2d 1037 (D.S.D. 2004), App. 40a-67a, and (2) denying respondent's motion for reconsideration is reported at 353 F. Supp.2d 1059 (D.S.D. 2005), App. 21a-39a.

JURISDICTION

The Court of Appeals entered its opinion on August 9, 2006, and denied a timely petition for rehearing on September 27, 2006. App. 68a. On December 6, 2006, Justice Alito signed an order extending the time for filing this Petition up to and including January 25, 2007. App. 06A556. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Prior to September 1999, the Minnehaha County Juvenile Detention Center's ("JDC") written policy required staff to conduct strip searches of *all* juveniles regardless of the reason they were brought to the JDC, regardless of whether the juvenile was to be admitted to the JDC, and regardless of whether reasonable suspicion existed to believe that the juvenile possessed weapons or contraband. Specifically, the policy required a JDC staff person to escort the juvenile to the JDC's shower room and to instruct the juvenile to remove all of his or her clothing, including undergarments. The policy then required the JDC staff person to conduct *a thorough visual inspection of the juvenile's naked body.* The juvenile was required to comb through and, if necessary, lift his or her hair and to turn around to expose all parts of the body. The juvenile was then required to take a shower in full view of the JDC staff.

The JDC, which serves fourteen counties in the southeast portion of South Dakota, has both secure and non-secure rooms to house juveniles; the non-secure area is intended to house juveniles during short-term stays at the JDC.[2] The JDC's universal strip search policy applied to all individuals

2. Juveniles who are brought to the JDC fall within one of three categories: (1) children who are abused or neglected; (2) Children in Need of Supervision ("CHINS"), e.g. runaways, truancy, unamenable, liquor violations, *see* S.D. CODIFIED LAWS § 26-8B-2 (2006); and (3) juveniles categorized as delinquents, which includes juveniles charged with offenses ranging in seriousness from curfew violations to murder. Juveniles who are abused and neglected are never admitted to the JDC. They are not members of the petitioner class.

brought to the JDC, regardless of whether or not the individual was to be admitted to the secure or non-secure portion or not admitted at all. In practice, however, after the non-secure area was built in 1998 or 1999, some JDC staff, contrary to JDC policy, modified the strip search procedures, on an ad hoc basis, for some of the juveniles who were going to be in the non-secure area for less than a half hour.[3] Specifically, some JDC officers visually inspected some of the juveniles while the juvenile stood naked except for undergarments. This is the type of search that a JDC officer conducted on the class representative, Jodie Smook.

On August 8, 1999, Smook, then sixteen years old, and three female friends were arrested by the Sioux Falls City Police Department after their car broke down, and were charged with violating curfew. The police transported Smook and her friends to the JDC. Shortly after her arrival at the JDC, Smook was taken into a restroom and ordered to remove her clothes. She was permitted to remain in her bra and underwear while she was searched. During the search, Smook was crying and emotionally upset. The JDC staffer lifted Smook's arms and looked under them, as well as between her toes and through her hair. No contraband of any kind was found on her person or in her clothes. Smook was then allowed to get dressed, and was returned to a bench to await her parents, who arrived shortly thereafter and took her home.

In September 1999, after Smook complained about the strip search policy to the Sioux Falls daily newspaper, the *Argus Leader*, the JDC revised its policies regarding searches. The new policy provides that a juvenile brought to the JDC for minor offenses (i.e., curfew, petty theft, or liquor

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3. In June 1999, then-Director Jim Banbury discovered this practice and reemphasized to the JDC staff the importance of strip searching *every* juvenile who was brought to the JDC and issued a directive regarding the mandatory nature of the strip search policy.

violations), or as a Child In Need of Supervision ("CHINS"), is to be given a two-hour grace period during which JDC staff attempt to locate an appropriate adult to take custody of the juvenile before a strip search is conducted. If a parent or guardian agrees to pick up the juvenile within the two-hour time frame, a JDC staff member is to conduct an "inventory search," which involves having the juveniles remove bulky clothing and shoes, turn out their pockets, roll up their pant legs, and pull down their socks. The JDC staff person then conducts a visual search of the juvenile. If the JDC staff member believes there is reasonable suspicion that the juvenile is in possession of contraband following the inventory search, the staff member must complete a Reasonable Suspicion Assessment Form prior to conducting a strip search. If the JDC staff cannot reach the juvenile's guardian or the guardian refuses or fails to take custody within two hours of the juvenile being brought to the JDC, that juvenile is admitted to the JDC. All juveniles admitted to the JDC, whether to the non-secure or the secure unit, are subjected to a strip search by a JDC staff member without any individualized consideration.[4]

In this class action, petitioners challenge this policy and practice of strip searching juveniles who are brought to the JDC for minor or non-felony offenses, without individualized suspicion. The class of petitioners consist of the following:

> All persons . . . who, when they [were] under the age of eighteen years, were charged with *minor*

4. In February 2000, the South Dakota legislature passed S.D. CODIFIED LAWS § 26-11-1.1 (2006), which provides that "No person under the age of eighteen detained solely for curfew violation may be strip-searched." Thereafter, the JDC again amended its policy: "When a juvenile is brought to JDC and the ONLY charge is curfew violation he/she CAN NOT [sic] be strip searched, unless there is probable cause to do so." For juveniles charged only with violating curfew, the most recent JDC policy requires JDC staff to conduct only an inventory search and allows a strip search only after completion of a reasonable suspicion form.

> *offenses*[5] from November 1, 1997 to a date to be set by the Court or were charged with *non-felony offenses* from April 16, 1999 to a date to be set by the Court, and were, pursuant to JDC policy, strip searched at the Minnehaha County Juvenile Detention Center.

App. 45a (emphasis added).

District Court Opinions

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331. Petitioner class challenged JDC's strip search policy, pursuant to 42 U.S.C. § 1983, as being in violation of the Fourth and Fourteenth Amendments. In finding the JDC's strip search policy unconstitutional, the district court relied on the balancing test set forth in *Bell v. Wolfish*, 441 U.S. 520 (1979).[6] App. 48a. The district court followed the *unanimous holdings* of the United States courts of appeal, including the Eighth Circuit, that had found unconstitutional "jail or prison policies allowing or requiring

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5. The term "minor offenses" includes the offenses of petty theft, liquor violations, being a runaway, and curfew violations. The term "non-felony offenses" includes the offenses of unamenable, truancy, window peeking, tobacco, driving while revoked, contempt of court-CHINS, contempt of court-delinquent, disturbance of school, damage to private property, damage to public property, false impersonation, delinquent probation violation, delinquent violation court order, CHINS probation violation, CHINS violation court order, unlawful occupancy, failure to appear, and disorderly conduct. App. 46a.

6. The district court also granted Minnehaha County's motion for summary judgment on petitioners' claim that the JDC's policy of questioning juveniles about their religious affiliation and other personal matters was a violation of petitioners' right to privacy. App. 65a-66a. Petitioners did not appeal this ruling to the Eighth Circuit, and it is not before this Court.

persons arrested for traffic or other minor offenses to be strip searched in the absence of individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband." App. 50a.

The district court rejected Minnehaha County's arguments that the strip searches were necessary to detect abuse and neglect, reasoning that although JDC staff have an obligation to report indications of abuse, *see* S.D. CODIFIED LAWS § 26-8A-3 (2006), they do not have an affirmative duty to detect abuse and neglect, let alone in such an invasive manner. *See* App. 53a. The court also rejected Minnehaha County's argument that the searches of juveniles were reasonable administrative searches undertaken to protect those in the JDC's custody as well as JDC staff because the record did "not demonstrate that the incidence of smuggling weapons or contraband into the JDC is more than minimal." App. 54a.

The district court concluded that "minors charged with minor or non-felony offenses may be subjected to a strip search only if JDC officials possess a reasonable suspicion that the individual minor is carrying or concealing a weapon or other contraband." *Id.* at 55a-56a. Furthermore, refusing to draw the line of constitutionality at "whether the person being searched is completely nude or nearly nude," the district court held that Smook's search in particular also violated the Fourth Amendment. *Id.* at 58a-59a.

Thereafter, Minnehaha County requested the district court to reconsider its ruling based upon *N.G. v. Connecticut*, 382 F.3d 225 (2d Cir. 2004). On January 20, 2005, the district court denied Minnehaha County's motion for reconsideration, rejecting its newly raised contention that the government "has a higher governmental interest in protecting the security of juvenile detainees than it does in protecting adult detainees." App. 21a-22a, 27a, 39a. The court found that "officials in

charge of a juvenile detention facility and an adult prison or jail have the same security concern: assuring that weapons and other contraband are not introduced into the secure facilities." *Id.* at 27a. The court again rejected Minnehaha County's assertion that strip searches are necessary to detect abuse and neglect. The court reasoned that Minnehaha County does not have a duty to detect abuse and neglect, and even if it did, there was no evidence in the record that JDC staff could not rely on a far less invasive search to detect abuse or neglect, and that Minnehaha County failed to address the harm inflicted on juveniles by the strip search, especially on abused or neglected children. *See id.* at 31a. In sum, the district court rejected Minnehaha County's attempt to justify the searches on the basis of *in loco parentis* because of the JDC's "law enforcement role with the goal of ferreting out crime and collecting evidence to be used to prosecute the juveniles admitted to the JDC." *Id.* at 30a.

Decision of the Eighth Circuit Court of Appeals

On August 9, 2006, the Court of Appeals for the Eighth Circuit reversed the district court's decision, holding that (1) Smook's strip search was reasonable under the Fourth Amendment; (2) the individual defendants were entitled to qualified immunity; and (3) the class lacked standing to seek injunctive relief.[7] *Id.* at 1a-20a. In analyzing Smook's Fourth Amendment claim, the court relied upon the "special needs" test set forth in *Board of Education v. Earls*, 536 U.S. 822, 829 (2002). *See* App. 7a. "To determine whether a 'special needs' situation justifies a search without individualized suspicion, a court must undertake 'a fact-specific balancing of the intrusion . . . against the promotion of legitimate governmental interests.'" App. 7a (quoting *Earls*, 536 U.S. at 830).

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7. Petitioners are not seeking certiorari as to the Eighth Circuit's holding that the individual defendants are entitled to qualified immunity or that the class lacked standing to seek injunctive relief.

In applying the "special needs" balancing test to the facts of the case, the court relied almost exclusively on the Second Circuit's opinion in *N.G.* Specifically, the court emphasized the state's interests in performing such searches, as set forth in *N.G.*:

> (1) the State has "an enhanced responsibility to take reasonable action to protect [children] from hazards resulting from the presence of contraband where children are confined"; (2) a strip search serves "the protective function of locating and removing concealed items that could be used for self-mutilation or even suicide"; and (3) a strip search may "disclose evidence of abuse that occurred in the home, and awareness of such abuse can assist juvenile authorities in structuring an appropriate plan of care."

App. 8a-9a (quoting *N.G.*, 382 F.3d at 236). The court ostensibly balanced these state interests against Smook's interest, which it thought not to be as strong as the plaintiffs' claim in *N.G.* because she was permitted to remain in her bra and underwear, and concluded the following: "In light of the State's legitimate responsibility to act *in loco parentis* with respect to juveniles in lawful state custody, we conclude that after weighing the special needs for the search against the invasion of personal rights involved, the balance tips in favor of reasonableness." *Id.* at 10a.

On purportedly jurisdictional grounds, the Eighth Circuit declined to rule on the class's facial challenge to the JDC's universal strip search policy. *Id.* at 16a-17a.

REASONS FOR GRANTING THE PETITION

At issue is the universal policy and practice requiring that *every* juvenile brought to the JDC be subjected to a strip search – the most invasive of all searches.[8] These notoriously invasive searches are conducted on every juvenile without regard to the nature of the offense, the juvenile's criminal, social, medical, or psychological history, the juvenile's demeanor, the availability or results of any other preliminary or less invasive search, such as a pat down search, or any reason for thinking that the juvenile might be carrying contraband. In short, these juveniles were strip searched without any regard to who they were, what they may have done, or how and why they were brought to the JDC.

Despite the scores of cases applying probable cause and reasonable suspicion standards, or demanding a careful balancing of governmental interests against the individual's privacy interests, the policy and practice at issue here literally forbids such an evaluation. The Eighth Circuit's decision is also flawed because it misapprehends the critical privacy interest involved. Furthermore, it ignores the lack of a record establishing the need for the searches or the efficacy of the searches in meeting Minnehaha County's needs, instead blindly relying on the doctrine of *in loco parentis.* Worst of all, the court gives no attention to what is reasonable in light of the plethora of less intrusive but equally effective search alternatives. In so doing, the decision below is at odds with the ten circuit court opinions to consider a policy of strip searching adults arrested for minor offenses and a circuit court opinion considering such a policy as applied to juveniles.

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8. The JDC has since modified its policy to require reasonable suspicion prior to strip searching juveniles charged with minor offenses or CHINS who are picked up by a guardian within two hours, and those charged only with a curfew violation.

This split in the circuits on an issue of national importance requires review by this Court. The lack of uniformity on this important constitutional question creates a dilemma for detention officials throughout the country. Those officials are charged with the difficult task of administering a juvenile detention system in which over 2 million juveniles are arrested every year. OFF. OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DEP'T OF JUSTICE, STATISTICAL BRIEFING BOOK, *available at* http://ojjdp.ncjrs.gov/ojstatbb/crime/qa05101.asp. It is imperative that the law is clear regarding this most invasive of searches so that detention officials across the country have a clear understanding of the balancing standard, in which bright line rules such as the JDC's policy are rarely, if ever, appropriate. This is particularly important given that it is children, the most vulnerable members of society, who are being subjected to the fear, indignity, humiliation, and degradation of these searches. *See Justice v. City of Peachtree*, 961 F.2d 188, 192 (11th Cir. 1992); *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980).

I. Certiorari Is Necessary Because the Decision Below Creates A Significant Circuit Split With the Decisions of Ten Courts of Appeal Finding Universal Strip Search Policies To Be Unconstitutional.

In its decision below, the Eighth Circuit did something that no Supreme Court case, and only one other circuit (the Second Circuit),[9] had ever done – namely, adopt a bright line rule that the Fourth Amendment allows universal strip searches absent any individualized consideration, and also in the absence of any meaningful consideration of a plethora of less intrusive but equally effective alternatives. Moreover, the Eighth Circuit took this position when no fewer than ten circuit courts (including the Eighth and Second Circuits in

9. *See N.G. v. Connecticut*, 382 F.3d 225 (2d Cir. 2004).

prior decisions) had disapproved of such a bright line rule when applied to adults. These ten circuit courts had considered strip searches of adults who had been arrested for minor offenses where the searches had occurred without reference to the nature of the offense or any reasonable grounds to believe that the individual possessed contraband. Every one of these circuits held such policies and practices to be unconstitutional.[10]

Significantly, the Eighth and Second Circuits opened a circuit split on the constitutionality of strip searching juveniles because the initial circuit to consider the question correctly followed the analyses and reasoning in the adult cases and required individualized considerations before strip searches of juveniles would be allowed. In *Justice*, the police ordered a juvenile detained for loitering and truancy to strip down to her panties. 961 F.2d at 190. The Eleventh Circuit recognized that a "detention center, police station, or jail holding cell is a place 'fraught with serious security dangers.'" *Id.* at 193 (quoting *Bell*, 441 U.S. at 559). However, because strip searches are such a "serious intrusion upon personal rights," the court found that such searches had to be "based upon reasonable suspicion to believe that the juvenile is concealing weapons or contraband." *Id.* at 192. *See also Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988)

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10. *See Wilson v. Jones*, 251 F.3d 1340, 1343 (11th Cir. 2001); *Swain v. Spinney*, 117 F.3d 1, 7-8 (1st Cir. 1997); *Chapman v. Nichols*, 989 F.2d 393, 396-97 (10th Cir. 1993); *Masters v. Crouch*, 872 F.2d 1248, 1253-54 (6th Cir. 1989); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986); *Stewart v. Lubbock County*, 767 F.2d 153, 156-57 (5th Cir. 1985); *Jones v. Edwards*, 770 F.2d 739, 741-42 (8th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614, 617-618 (9th Cir. 1984), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981).

(holding unconstitutional universal strip search policy towards detained juveniles applied by the Immigration and Naturalization Service), *rev'd on other grounds sub nom. Reno v. Flores*, 507 U.S. 292 (1993).

. Despite the unanimous agreement of the circuit courts that individualized suspicion is necessary prior to strip searching a person charged with a minor offense, particularly with regard to juveniles, the recent Second Circuit decision in *N.G.* and the decision below have effectively carved a gaping hole into the Fourth Amendment by holding that the "State's legitimate responsibility to act *in loco parentis* with respect to juveniles" replaced the need for individualized suspicion.[11] App. 10a. *See also id.* at 8a; *N.G.*, 382 F.3d at 232.

Certiorari is, therefore, warranted under Supreme Court Rule 10(a) because of the circuit split regarding the circumstances in which the Fourth Amendment tolerates strip searches of juveniles.

II. Certiorari is Warranted Because the Eighth Circuit's Decision Misapplies the Reasonableness Standards Set Forth by This Court – and Virtually Every Other Circuit Court.

The decision below misapplied and ignored crucial factors required to be considered in applying the balancing test to determine the reasonableness of the universal strip

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11. In addition to disregarding ten circuit court opinions, the court below also ignored this Court's holding that reasonable suspicion is required in the far less invasive "stop and frisk" investigatory stop of a juvenile under *Terry v. Ohio*, 392 U.S. 1 (1968). *See Florida v. J.L.*, 529 U.S. 266 (2000); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 337-38 (1985)("A search of a *child's person* or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.") (emphasis added).

search policy. Prior to the Second Circuit's decision in *N.G.*, 382 F.3d 225, every court had applied the balancing test set forth in *Bell*, 441 U.S. at 559, when evaluating the reasonableness of universal strip searches of individuals charged with minor offenses. In *Bell*, this Court acknowledged that the test of reasonableness "is not capable of precise definition or mechanical application" but "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." 441 U.S. at 559. The Court cautioned that "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted" must all be considered. *Ibid.*

The court in *N.G.* rejected the *Bell* balancing test and for the first time extended the "special needs" exception to juvenile strip searches. *See N.G.*, 382 F.3d at 237-38. The court below, following *N.G.*, also applied the special needs exception on the basis of the state's "legitimate responsibility to act *in loco parentis* with respect to juveniles in lawful state custody." App. 10a. Under the special needs exception, Fourth Amendment constitutionality is determined under a balancing test that weighs "the competing private and public interests advanced by the parties." *Chandler v. Miller*, 520 U.S. 305, 314 (1997). The decision below misapplied the "special needs" exception by attributing insufficient importance to the dramatic level of the intrusion and substituting the doctrine of *in loco parentis* for any real analysis of governmental interests based on the record.[12]

Regardless of whether the proper test for evaluating the JDC's policy is the *Bell v. Wolfish* balancing test or the

12. Further, the court below utterly failed to consider petitioners' facial challenge to the policy, instead choosing to "dismiss for lack of jurisdiction that portion of the county's appeal regarding liability for damages to the unnamed class members," and remanding the issue to the district court for further consideration. App. 16a-17a.

"special needs" balancing test, this Court has consistently held that it is necessary to apply a balancing test under which the competing interests are closely and meaningfully examined to determine reasonableness under the Fourth Amendment.[13] The broadly worded decision of the court below permits universal strip searches of juveniles without adequate recognition of the individual's interest and based exclusively on asserted, but wholly unsubstantiated, institutional needs.

It is also fatally flawed for two other reasons. First, it relies on the faulty reasoning that the Fourth Amendment allows Minnehaha County to purportedly protect juveniles by subjecting them to a highly intrusive and traumatic search regardless of the many less intrusive but equally effective search methods available. This is a perversion of established Fourth Amendment doctrine. It is nonsensical to conclude that the states's duty to "take special care to protect those in its charge," *N.G.*, 382 F.3d at 232, somehow justifies subjecting children to an invasive, unnecessary, and traumatic strip search. *See In re Winship*, 397 U.S. at 365-66 ("[C]ivil

13. This Court has applied the "special needs" exception in ruling on less invasive searches of juveniles in the school setting. In that context, this Court has sometimes afforded a somewhat lower level of Fourth Amendment protection to juveniles, *see Earls*, 536 U.S. 822; however, lower courts have still held that school officials must have reasonable suspicion prior to strip searching students. *See Phaneuf v. Fraikin*, 448 F.3d 591, 597 (2d Cir. 2006); *Renfrow*, 631 F.2d at 92-93; *M.M. v. Anker*, 607 F.2d 588, 589 (2d Cir. 1979). This lower level of constitutional protection in the school setting has been based, in part, on this Court's concern with requiring school officials to educate themselves on the legal standards of probable cause in light of their primary duty of educating students. *See T.L.O.*, 469 U.S. at 342-43. This is not a concern in the juvenile detention context, which is staffed by law enforcement personnel who routinely balance the safety of persons in the institution against the individual rights of the individuals in their custody.

labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts."); Katherine A. James, *Standard Operating Procedure: Take It All Off*, 44 Washburn L.J. 665, 685 (2005) ("Acts that lead to this type of psychological damage cannot also logically promote the welfare of juveniles.").

Second, it flies in the face of the principle that the more intrusive the search, the closer governmental authorities must come to demonstrating probable cause for believing that the search will uncover the objects for which the search is being conducted. *See Terry*, 392 U.S. at 18 n.15. Morever, the court below utterly disregards this Court's repeated warnings that bright line rules are to be avoided in the context of searches. *Cf. Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (in applying the Fourth Amendment's reasonableness test, this Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry").

A. The evaluation by the court below of the privacy interests at stake for the detainees conflicts with every other circuit court.

In evaluating the reasonableness of the JDC's strip search policy, the Eighth Circuit failed to recognize the extent to which a strip search by a government official intrudes upon the privacy and dignitary interests at stake. This stands in stark contrast to every other court that has considered the "serious intrusion of personal rights" represented by a strip search. *See Chapman*, 989 F.2d at 395-396. Under either the balancing test set forth in *Bell*, 441 U.S. at 559, or the balancing test applicable in the "special needs" cases, *see Earls*, 536 U.S. at 830, a strip search is "an invasion of personal rights of the first magnitude." *Chapman*, 989 F.2d at 395. Requiring individualized suspicion prior to strip searching an individual charged with a minor offense has its roots in the long-established principle that strip searches, as

opposed to all other searches, "instinctively give[] [courts] the most pause." *Bell,* 441 U.S. at 558.

In *Chapman*, the Tenth Circuit evaluated the constitutionality of a jail's policy requiring strip searches of detainees charged with minor offenses, and stated,

> [t]he experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state, in an enclosed room inside a jail, can only be seen as thoroughly degrading and frightening. . . . [S]uch a search upon an individual detained for a lesser offense is quite likely to take that person by surprise, thereby exacerbating the terrifying quality of the event.

989 F.2d at 395-96 (internal quotations and citation omitted). *See also Burns v. Lornager,* 907 F.2d 233, 235 n.6 (2d Cir. 1990) (strip searches are "an extreme intrusion upon personal privacy" and "an offense to the dignity of the individual"); *Jones*, 770 F.2d at 742 (describing the strip search as "intrusive, depersonalizing and distasteful"); *Mary Beth G.*, 723 F.2d at 1272 (strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission").

The intrusion into the privacy, and the violation of the dignity, of those brought to the JDC is greatly exacerbated because they are juveniles. Courts have uniformly recognized that juveniles are likely to be *more* traumatized than adults by strip searches. *See Justice*, 961 F.2d at 192 ("'[C]hildren are especially susceptible to possible traumas from strip searches'") (internal citations omitted). As the courts have long recognized, "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is

an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency." *Renfrow,* 631 F.2d at 92-93 (the strip search at issue "exceeded the 'bounds of reason' by two and a half country miles"). *See also Eddings v. Oklahoma,* 455 U.S. 104, 115 (1982) (youth "is a time and condition of life when a person may be most susceptible to influence and psychological damage"). Even the Second Circuit in *N.G.* recognized that "the adverse psychological effect of a strip search is likely to be more severe upon a child than an adult." 382 F.3d at 232. *See also* James, 44 Washburn L.J. at 686 ("Strip searches paralyze and traumatize some children, and can lead to psychological difficulties equivalent to those suffered by rape victims.").

This Court's decisions have repeatedly limited the "special needs" exception to instances "'where the privacy interests implicated by the search are *minimal.*'" *Chandler*, 520 U.S. at 314 (quoting *Skinner,* 489 U.S. at 624) (emphasis added). The Court has also emphasized that the "special needs" exception should be limited to a "closely guarded category of constitutionally permissible suspicionless searches" *Id.* at 308. Nonetheless, in extending the "special needs" exception here and in *N.G.*, the Eighth and Second Circuits incorrectly relied upon cases where the searches (*i.e.*, drug tests), were significantly less intrusive than an "inspection by state officials of the plaintiff's naked body." *N.G.,* 382 F.3d at 241. *See, e.g., Earls,* 536 U.S. at 830 (student drug tests); *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 664-65 (1995) (same); *Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656, 679 (1989) (employee drug tests); *Skinner,* 489 U.S. at 619, 634 (same); *O'Connor v. Ortega,* 480 U.S. 709, 728-29 (1987) (searches of public employees' personal papers); *T.L.O.,* 469 U.S. at 347-48 (search of a high school student's purse).

In the present case, the state's interest falls far short of justifying something as invasive as a strip search, yet the court below improperly avoided serious consideration of the grave nature of the intrusiveness, summarily rejecting it as a concern.[14]

B. The decision by the court below is fatally flawed for failing to consider less intrusive but equally effective search methods when determining reasonableness.

The unreasonableness of the JDC's strip search policy is evident given the many less intrusive but equally effective alternatives that exist. Although Minnehaha County is not obligated to use the least intrusive means possible, it has made absolutely no showing that a strip search, rather than other methods of searching, is necessary to adequately satisfy its interests. The JDC could utilize a less invasive search, such as a pat down or frisk search, or as its policy now requires for some juveniles who will be picked up within two hours, an inventory search, which involves a visual inspection after the juveniles remove bulky clothing and shoes, turn out their pockets, roll up their pant legs, and pull down their socks. *See Chapman*, 989 F.2d at 397 ("jails can meet the minimal security concerns they may have with minor offenders by means of a less intrusive pat-down search") (internal citations omitted). Or the JDC could install a metal detector. Another viable alternative is for the JDC to house

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14. There is no basis in the record or the caselaw for the Eighth Circuit's strange and unique treatment of a strip-to-underwear search, as Smook was compelled to undergo, as qualitatively different from a nude strip search. *See Justice*, 961 F.2d at 190 (holding reasonable suspicion necessary for strip search of juvenile down to her underwear). Particularly for an adolescent, being forced by a stranger to strip to her underwear, and to then be touched and examined by that person, is a traumatic experience, as Smook testified.

those charged with minor and non-felony offenses separate and apart from those charged with more serious crimes, especially since the JDC's facility has both secure and a non-secure areas. *See Giles*, 746 F.2d at 618. Moreover, the JDC may conduct strip searches where there is reasonable suspicion, or even without reasonable suspicion if the juvenile is arrested for offenses more serious than minor or non-felony offenses.

As part of its overall misapplication of Fourth Amendment law, the court below utterly failed to consider these alternatives in evaluating the reasonableness of the JDC's policy.

C. The evaluation by the court below of the state's need for the universal strip search policy is contrary to every other circuit court.

The Eighth Circuit's ruling ignores the plethora of court of appeals cases that have addressed strip searches in a law enforcement context, and provides insufficient justification for why the state's interest outweighs the individual's in this particular juvenile detention facility context.[15] For example,

15. In relying on *in loco parentis*, the Eighth Circuit failed to consider that a juvenile detention center is a law enforcement facility, akin to a jail or prison and that JDC officials are acting in a law enforcement role when conducting the searches at issue. The district court noted the inherent inconsistency of relying on *in loco parentis* in the context of this "[h]arsh and potentially scaring" strip searching of juveniles suspected of minor offenses. App. 25a. *See Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 355 (8th Cir. 2004)(unconstitutional to conduct suspicionless searches of personal items of students where search can lead to criminal sanctions, "rather than acting *in loco parentis*, with the goal of promoting the students' welfare, the government officials . . . are . . . playing a law enforcement role with the goal of ferreting out crime and collecting evidence to be used in prosecuting students.").

though the court below purported to follow *N.G.*, a comparison of the two decisions shows how badly the former misapplied the Fourth Amendment's balancing test. In finding that the particular strip searches of the two plaintiffs were constitutional, the two-member majority in *N.G.* relied on the extensive history of both girls, which included mental illness, suicide attempts, self-mutilation, sexual activity with older men, drug and alcohol abuse, drug-peddling, and a history of persistent truancy. *See N.G.*, 328 F.3d at 237-38. In contrast, the court below did not conduct any sort of analysis as to the necessity of the strip search of petitioner Smook.

1. The state's interest in detecting abuse and neglect does not justify the JDC's universal strip search policy.

Both the Eighth and Second Circuits rely on the purported need to detect abuse and neglect to justify the constitutionality of the strip searches at issue. However, the state's interest in detecting abuse does not warrant a search as invasive as the strip searches conducted here. Prior to the decisions in *N.G.* and *Smook*, there was no authority that the state's interest in detecting abuse and neglect "justifie[d] the invasion of the minor's personal rights involved in a strip search."[16] App. 53a.

Although the JDC staff are mandatory reporters of child abuse, S.D. CODIFIED LAWS § 26-8A-3, South Dakota law does

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16. To the contrary, the ruling below conflicts with the decisions of the Second, Third, Ninth, and Tenth Circuits that require a warrant or probable cause prior to strip searching a child in the course of a child abuse investigation. *See Tenenbaum v. Williams*, 193 F.3d 581, 606 (2d Cir. 1999); *Calabretta v. Floyd*, 189 F.3d 808, 817-818 (9th Cir. 1999); *Franz v. Lytle*, 997 F.2d 784, 791-792 (10th Cir. 1993); *Good v. Dauphin County Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1092 (3rd Cir.1989).

not impose any duty upon, or expect, "mandatory reporters" to detect abuse or neglect, only to report it once it is discovered. *See* App. 53a. Further, Minnehaha County failed to present any evidence whatsoever as to the efficacy of strip searches in detecting child abuse,[17] *see Earls*, 536 U.S. at 834, and the Eighth Circuit completely failed to weigh the considerable harm a strip search inflicts upon the very same children the policy purports to protect, those who are abused or neglected.

2. The state's interest in detecting contraband does not justify a universal strip search policy.

The Eighth Circuit's view that the state has "'an enhanced responsibility to take reasonable action to protect [children] from hazards resulting from the presence of contraband where children are confined'" and to remove "'concealed items that could be used for self-mutilation or even suicide,'" and that these considerations justify a universal strip search policy, directly conflicts with the Eleventh Circuit's ruling in *Justice*. App. 8a-9a (quoting *N.G.*, 382 F.3d at 236). In *Justice*, the court held that the state's "considerations regarding contraband are the same whether the detainee is a juvenile or an adult." 961 F.2d at 193. Furthermore, there is no evidence in the record (or other reason to believe) that an adult would be less likely to attempt to bring in contraband or to attempt to harm himself upon admission to a detention facility. Regardless of the age of the person detained, state officials have the same duty to protect persons in the state's custody.

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17. Although not considered by the court below, Minnehaha County actually attempted to justify the strip search policy by claiming it was necessary to protect against unfounded claims of abuse by detainees. This asserted justification is not only without a factual basis, it also logically would justify strip searching adults in custody.

Similarly, the state's interest in deterring juveniles from smuggling contraband is no greater than its interests in deterring adults and is an insufficient basis to lessen the Fourth Amendment rights of children. As with adults, "it is common for children to be arrested unexpectedly and confined immediately." *N.G.*, 382 F.3d at 243 (Sotomayor, J., dissenting); *see also Giles*, 746 F.2d at 617 ("arrest and confinement [] are unplanned events, so the policy could not possibly deter arrestees from carrying contraband"). In addition, the Eighth Circuit's rationale presumes that juveniles are well-versed in the detention center's admission policies, a presumption that has no justification in this record. Juveniles cannot be deterred from attempting to smuggle contraband when they lack the foresight to know they will be arrested and if they are unaware that they may be strip searched upon arrival at the JDC.

The Eighth Circuit's analysis also conflicts with precedent because it does not meaningfully evaluate the state's need for the strip search when considering the reasonableness of the search. *See Earls*, 536 U.S. at 834. In striking down another universal strip search policy, the Ninth Circuit stated that the "County has not demonstrated that its security interests warrant the serious invasion of privacy inflicted by its policy. The record reveals that the incidence of smuggling activity at the ... [j]ail is minimal." *Giles*, 746 F.2d at 617. *Accord Mary Beth G.*, 723 F.2d at 1272. Minnehaha County's sole evidence as to the necessity of the strip search is an affidavit from Todd Cheever, the current director of the JDC, stating that: (a) juveniles "sometimes attempt to introduce" contraband into the JDC during intake; and (b) there is a "large box of weapons and contraband representing materials found on admittees over the years" in his office. App. 28a. From these statements there is no way to evaluate the frequency, nature, or amount of any contraband discovered, let alone whether a strip search was

needed to discover it. The evidence also fails to establish whether the contraband was seized from juveniles charged with non-felonies, or was seized after strip searches based on reasonable suspicion or based on the universal policy, or whether strip searches were even involved in the seizure. In short, there is *no evidence* in this record establishing the JDC's need for this universal strip search policy. For these reasons, the district court found Minnehaha County's evidence entirely unpersuasive. App. 28a.

It has also been established that a strip search cannot be justified based upon some class members being housed in the same area of the JDC as those charged with more serious offenses:

> the fact of intermingling [with other inmates] alone has never been found to justify such a search without consideration of the nature of the offense and the question of whether there is any reasonable basis for concern that the particular detainee will attempt to introduce weapons or other contraband into the institution.

Masters, 872 F.2d at 1254. Furthermore, the state's interests are greatly lessened with respect to the many class members who, like Smook, were never admitted to the detention center, but instead were promptly released to a parent or guardian. A search is even more unreasonable in that context. *See Ward v. County of San Diego*, 791 F.2d 1329, 1333 (9th Cir. 1986).

Similarly, the nature of the offenses with which the detainees are charged does not justify extending fewer Fourth Amendment protections in this case compared to the cases involving adults. Not only are the juveniles in the petitioner class charged with only minor offenses and non-felony offenses, some of the juveniles are not charged with any

offense at all and are brought to the JDC for reasons such as having run away from home or truancy. *See, e.g., Jones,* 770 F.2d at 740 (arrested for violating animal leash law); *Giles*, 746 F.2d at 615 (arrested for traffic violation); *Chapman*, 989 F.2d at 394 (arrested for driving with suspended drivers licenses); *Weber*, 804 F.2d at 799 (arrested for false report).

Finally, the types of offenses for which the juveniles in the petitioner class are brought to the JDC, like Jodie Smook's arrest for a curfew violation, are not ones "commonly associated by [their] very nature with the possession of weapons or contraband." *Logan*, 660 F.2d at 1013. *See also Giles*, 746 F.2d at 618 ("offense was minor and was related neither to drugs nor to weapons"). The only time prior to *N.G.* that courts have authorized strip searches *without the need for particularized suspicion* has been in the context of adults convicted of felonies and confined in a prison. *See Bell,* 441 U.S. at 560. In contrast to the present case, the detainees in *Bell* were awaiting trial on serious federal charges after having failed to make bond, were being held in a facility fraught with security dangers, and were searched after contact visits when contraband could have been passed. *See id.* at 524, 529 n.40. None of these factors is present here.

By adopting a bright line policy mandating the indiscriminate use of intrusive, humiliating, and degrading strip searches of juveniles, Minnehaha County closed its eyes to the strong consensus of circuits across the country that universal strip search policies governing arrestees do not pass Fourth Amendment muster.

Certiorari is, therefore, warranted under Supreme Court Rule 10(a) and 10(c) because the Eighth Circuit's decision on this important question of federal law, which has not been squarely addressed by this Court, conflicts with decisions from this Court and from other circuit courts.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED AUGUST 9, 2006

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-1363

JODIE SMOOK, individually and on behalf of all other persons similarly situated,

Appellee,

v.

MINNEHAHA COUNTY, South Dakota; Jim Banbury, in his individual capacity; Todd Cheever, as Director of Minnehaha County Juvenile Detention Center,

Appellants.

Submitted: Dec. 14, 2005
Filed: Aug. 9, 2006

Rehearing and Rehearing En Banc
Denied Sept. 27, 2006.*

Before MELLOY, COLLOTON, and BENTON, *Circuit Judges.*

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* Judge Bye would grant the petition for rehearing en banc Judge Wollman did not participate in the consideration or decision of this matter.

Appendix A

COLLOTON, *Circuit Judge.*

Jodie Smook filed this action pursuant to 42 U.S.C. § 1983, "individually and behalf of all other persons similarly situated," alleging, among other things, that the policy of the Minnehaha, South Dakota, County Juvenile Detention Center ("JDC") to "strip search[ ] minors without probable cause" was unconstitutional. The complaint sought damages and injunctive relief. After granting Smook's motion for class certification, the district court denied the defendants' motions for summary judgment on the search claims, and granted the plaintiffs' motion for partial summary judgment on those claims. Defendants Jim Banbury and Todd Cheever, directors of the JDC, appeal the district court's denial of qualified immunity, and Minnehaha County also appeals the court's denial of its motion for summary judgment. We reverse and remand.

I.

Smook's complaint alleged that on August 8, 1999, when she was 16 years old, she and three minor friends were arrested by the Sioux Falls City Police Department after 11:00 p.m. for violating local curfew laws. All four juveniles were transported to the JDC. Smook alleged that as part of the admission process at the detention center, she and each of her friends were taken into a bathroom and "strip searched" by JDC personnel. (Complaint, R. Doc. No. 1, at 3-4). In her complaint, Smook asserted that the institution's search policy or practice was a violation of her right against unreasonable search and seizure under the Fourth and Fourteenth Amendments.

Appendix A

The district court certified two classes of plaintiffs who:

> when they [were] under the age of eighteen years, were charged with minor offenses from November 1, 1997 to a date to be set by the Court or were charged with non-felony offenses from April 16, 1999 to a date to be set by the Court, and were, pursuant to JDC policy, strip searched at the Minnehaha County Juvenile Detention Center.

(R. Doc. Nos.42, 78). One class was defined as individuals in this category seeking injunctive relief; the other encompassed individuals seeking compensatory and punitive damages. The court further defined "minor offenses" to include petty theft, liquor violations, being a runaway, and curfew violations, and defined "non-felony offenses" to include a litany of other specific non-violent offenses, such as truancy, tobacco, contempt of court, disturbance of school, and damage to public and private property.[1]

According to the written admission policy in effect at the time of Smook's arrest in 1999, when juveniles arrived at the JDC for admission, staff members were to take them to an intake area, to ask them to remove their personal items, and then to conduct an interview while an admission form

1. Smook's complaint also alleged that she was asked questions about her religious beliefs and practices and "ordered to answer those questions." (Complaint, R. Doc. No. 1, at 4). She alleged that these questions invaded her privacy and impinged upon her rights to free exercise of religion and freedom of association under the First and Fourteenth Amendments. The district court certified two other classes of plaintiffs in connection with these claims, but the claims were later dismissed, and they are not at issue on this appeal.

was filled out. A photograph was to be taken, and the juvenile was to be given a wristband identification bracelet. The policy then called for the juvenile to take a shower, during which time a detention officer was to conduct a visual inspection of the person's body and a manual search of the person's clothes, including pockets and linings. The policy dictated that searches should "only be conducted by members of the same sex" and that "[t]he juvenile is not touched throughout this procedure." (Appellees' App. at 60).

It is undisputed, however, that when Smook was admitted to the JDC, she was not required to take a shower or to disrobe completely. Rather, she was required to remove her outer clothing so that it could be searched, but she remained clothed in her undergarments in a private room with a female staff member. One female JDC official testified that she did not recall ever asking a juvenile to remove her undergarments, because "you can pretty much see what's there when they're in undergarments." (Appellants' App. at 4). Banbury testified to his belief that some staff were performing searches as described in the written policy, while others were not. (Appellees' App. at 152).

In September 1999, the JDC admissions policy was revised. One revision provides that when juveniles are arrested on minor charges or detained as children in need of supervision, the detention officials shall attempt for two hours to contact a parent, and if the parent agrees to pick up the minor, then the minor may not be searched or admitted to the secure area of the facility. In addition, the JDC modified the shower area by installing a screen that shields from view all but the head, neck, and lower leg area of a showering

youth's body. In response to a state law passed in 2000, which provides that "[n]o person under the age of eighteen detained solely for a curfew violation may be strip-searched," S.D. Codified Laws § 26-11-1.1, the JDC also modified its policy to disallow strip searches of such juveniles, unless the detention officer first fills out a "probable cause" form indicating why the search is warranted.

After discovery, the defendants filed a motion for summary judgment, arguing that strip searches of juveniles who were admitted to the facility was a reasonable administrative procedure, and further asserting that even if the searches were not constitutional, the defendant directors of the JDC were entitled to qualified immunity. The plaintiffs also filed a motion for summary judgment on their Fourth Amendment claim, arguing that the undisputed facts established that the policy of strip-searching all juveniles without individualized suspicion was a violation of clearly established constitutional law.

The district court denied the defendants' motions for summary judgment. The court concluded that the JDC's written search policy in effect in August 1999 was unconstitutional and that the subsequent changes to the policy did not cure the constitutional defects. (Mem. Op. and Order, R. Doc. No. 116, at 11). The court also concluded that the search of Smook in August 1999 violated her constitutional rights. (*Id.* at 14). The court further held that Banbury and Cheever were not entitled to qualified immunity because it was "clearly established for several years" prior to the time of the alleged violations that the Fourth Amendment prohibited "the kinds of searches of which Plaintiff and the class complain." (*Id.* at 15).

The district court then granted partial summary judgment for the plaintiffs on the Fourth Amendment claim. The court identified three remaining issues relating to these claims: "(1) what type of injunctive relief is appropriate in this case; (2) what amount of monetary damages are appropriate and how should the class members' damages be determined; (3) what should the ending date be for membership in the first two classes certified by the Court." (*Id.* at 18).

After the district court entered its order, the defendants filed a motion to reconsider based on a decision of the Court of Appeals for the Second Circuit, *N.G. v. Connecticut*, 382 F.3d 225 (2d Cir.2004), which was filed shortly before the district court granted partial summary judgment in favor of the plaintiffs. The court in *N.G.* held that the disrobing and visual inspection of two juveniles upon their admission to a detention facility was not a violation of the Fourth Amendment. *Id.* The defendants here argued that the *N.G.* decision supported the constitutionality of the JDC policy, and at least demonstrated that the institution's search policy did not violate clearly established rights in 1999. (Defs.' Mot. for Recons., R. Doc. No. 130, at 11-12). On reconsideration, however, the district court reiterated its holding that the searches violated the constitutional rights of the minors, and that the law was clearly established prior to the searches at issue. (Mem. Op. and Order, R. Doc. No. 140, at 12; Add. at 12).

Appendix A

II.

A.

We begin with the damages claim of the named plaintiff and class representative, Jodie Smook. The district court concluded that the search of Smook upon initial admission to the JDC, which required her to remove her outer clothing but not her undergarments, was unreasonable under the Fourth Amendment. The individual appellants, Banbury and Cheever, contend that the search was reasonable and, alternatively, that even if the search was unreasonable, the law was not clearly established on that point as of August 1999.

The Fourth Amendment proscribes "unreasonable" searches, and "[t]he test of reasonableness ... requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). "A search unsupported by probable cause may be reasonable when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Bd. of Educ. v. Earls*, 536 U.S. 822, 829, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) (internal quotations omitted). To determine whether a "special needs" situation justifies a search without individualized suspicion, a court must undertake "a fact-specific balancing of the intrusion ... against the promotion of legitimate governmental interests." *Id.* at 830, 122 S.Ct. 2559.

Appendix A

The most apposite precedent is the Second Circuit's recent opinion in *N.G. v. Connecticut*, where the court applied the foregoing principles to a strip search of juveniles upon initial admission to a detention facility. Judge Newman's opinion for the panel acknowledged that the circuits uniformly have held that adults held for minor offenses may not be strip searched without reasonable suspicion that they possess contraband. 382 F.3d at 232; *see Jones v. Edwards*, 770 F.2d 739, 741-42 (8th Cir.1985) The Second Circuit concluded, however, that "[s]trip searches of children pose the reasonableness inquiry in a context where both the interests supporting and opposing such searches appear to be greater than with searches of adults confined for minor offenses." *N.G.*, 382 F.3d at 232. The State has a greater interest in conducting such a search, because "[w]here the state is exercising some legitimate custodial authority over children, its responsibility to act in the place of parents (*in loco parentis*) obliges it to take special care to protect those in its charge, and that protection must be concerned with dangers from others and self-inflicted harm." *Id.* The juvenile's interest in privacy is greater than an adult's, the court thought, because "the adverse psychological effect of a strip search is likely to be more severe upon a child than an adult, especially a child who has been the victim of sexual abuse." *Id.*

After finding no prior appellate decision concerning the reasonableness of strip searches of juveniles in lawful state custody, the Second Circuit tallied the State's legitimate interests in performing such searches: (1) the State has "an enhanced responsibility to take reasonable action to protect [children] from hazards resulting from the presence of

contraband where children are confined"; (2) a strip search serves "the protective function of locating and removing concealed items that could be used for self-mutilation or even suicide"; and (3) a strip search may "disclose evidence of abuse that occurred in the home, and awareness of such abuse can assist juvenile authorities in structuring an appropriate plan of care." *Id.* at 236. Then assessing the risks to the well-being of the juveniles and institutional safety from not conducting the searches as compared to the risks to the psychological health of the children from performing the searches, the court held that "strip searches upon initial admission do not violate Fourth Amendment standards." *Id.* at 237. A dissenting judge concluded that the strip searches were unconstitutional because the State had failed to demonstrate a "close and substantial relationship" of the invasive strip searches to a legitimate governmental need. *Id.* at 242 (Sotomayor, J., dissenting).

Smook's constitutional claim is not as strong as that of the juveniles in *N.G.*, because she was not subjected to a full strip search. She was taken to a private restroom by a female staff person, who explained that she would search Smook's clothes for drugs, drug paraphernalia, and weapons. The staff person directed Smook to remove her shorts, t-shirt, and sandals, and then turned the clothes inside-out, pulled the pockets inside-out, and looked through the sandals to ensure that they did not have a false bottom. (Appellants' App. at 30). Smook remained attired in her undergarments, which she testified placed her at the same level of undress as if she were "at the beach in a swimsuit." (*Id.* at 33). The staff person touched Smook to look under her arms, between her toes, and through her hair and scalp. (*Id.* at 30). After searching

the clothing, the staff member returned the clothes to Smook and allowed her to get dressed. (*Id.*).

We conclude that this search was reasonable within the meaning of the Fourth Amendment. The legitimate interests of the State, surveyed by the Second Circuit in *N.G.*, were present in this case and weigh in favor of reasonableness. The search, while intrusive to a degree, presented a lesser invasion of privacy than a full strip search. It has been observed that strip searches requiring a person to disrobe completely have a "uniquely invasive and upsetting nature," *N.G.*, 382 F.3d at 239 (Sotomayor, J., dissenting), and the decision of JDC officials to perform a less intrusive search distinguishes this incident from the close constitutional issue presented in *N.G.* We do not gainsay that requiring a minor disrobe to her undergarments, even in a private room with only one staff member of the same sex, may still be a stressful and disturbing experience. But even the dissenting opinion in *N.G.* did not question that a juvenile detention facility could justify "a potentially-invasive search of some kind-such as a frisk search or a thorough search of all of a detainee's clothing and possessions," *id.* at 244, and there are obvious practical difficulties in conducting a thorough search of a detainee's clothing while the detainee is wearing them. In light of the State's legitimate responsibility to act *in loco parentis* with respect to juveniles in lawful state custody, we conclude that after weighing the special needs for the search against the invasion of personal rights involved, the balance tips in favor of reasonableness. We thus conclude that Banbury and Cheever did not violate Smook's constitutional rights.

Appendix A

Our decision in *Doe v. Little Rock School District*, 380 F.3d 349 (8th Cir.2004), does not dictate a different conclusion. In that case, our court held that a practice of subjecting secondary public school students to random, suspicionless searches of their persons and belongings by school officials was unconstitutional. As part of the analysis, we observed that "the fruits of the searches at issue here are apparently regularly turned over to law enforcement officials and are used in criminal proceedings against students whose contraband is discovered." *Id.* at 355. We concluded that "[r]ather than acting *in loco parentis*, with the goal of promoting the students' welfare, the government officials conducting the searches are in large part playing a law enforcement role with the goal of ferreting out crime and collecting evidence to be used in prosecuting students." *Id.*

Smook points out that the JDC policy at issue here provides that the law enforcement officer admitting a juvenile to the facility should stay at the JDC until the completion of the search, that any contraband found on a juvenile is to be taken by the police officer, and that "it is the officer's decision regarding further charges." (Appellees' App. at 59). Smook argues that because the searches may produce evidence that an officer could refer to a prosecutor in support of potential criminal charges, the analysis in *Doe* compels a finding that the searches are unreasonable. The *Doe* decision, however, should not be read to establish that a suspicionless search based on "special needs" is *per se* unconstitutional whenever the fruits of the searches may potentially be used in criminal proceedings. In that case, we inferred from the available evidence that the officials conducting searches acted "with the goal of ferreting out crime and collecting evidence," rather

than "with the goal of promoting the students' welfare." 380 F.3d at 355.

We do not draw the same inference from the evidence here. Officers already are permitted to search juvenile arrestees for evidence as an incident of the arrest, even for a minor offense, *see Atwater v. City of Lago Vista*, 532 U.S. 318, 354-55, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001); *id.* at 364 (O'Connor, J., dissenting), and the goals of law enforcement to gather evidence are thus largely satisfied prior to admission at the JDC. We are not persuaded that the JDC's profession of concern for the welfare of juveniles admitted to the facility is merely a pretextual explanation for searches that are in large part designed to gather evidence for criminal prosecutions. As outlined above and in the decision in *N.G.*, a residential facility like the JDC has sound reasons to act *in loco parentis*, and the incidental possibility that evidence might be discovered and referred to a criminal prosecutor (no example of which is disclosed in this record) is insufficient to render the search of Smook unreasonable.

Because Minnehaha County's appeal regarding liability for the search of Smook is inextricably intertwined with the appeal of the individual defendants, *see Avalos v. City of Glenwood*, 382 F.3d 792, 801 & n. 1 (8th Cir.2004); *Kincade v. City of Blue Springs*, 64 F.3d 389, 394-95 (8th Cir.1995), we have jurisdiction to consider the county's appeal on that point. For the reasons discussed, we likewise conclude that, assuming there was a direct causal link between the search of Smook and the municipal policy, *see City of Canton v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), the county did not violate Smook's constitutional rights.

Alternatively, assuming for the sake of argument that the district court was correct that there is no constitutional distinction between searches of juveniles in undergarments and searches of juveniles stripped of all clothing, and assuming the district court's conclusion that all such searches without probable cause are unreasonable, we hold that Banbury and Cheever are entitled to qualified immunity from claims for damages arising from the search of Smook in 1999. As of that year, there was no appellate decision from the Supreme Court, this court, or any other federal circuit ruling on the reasonableness of strip searches of juveniles in lawful state custody. See *N.G.*, 382 F.3d at 233.[2] Our court, like many others, had concluded that a strip search of adult offenders without individualized suspicion was unreasonable, but those cases did not consider the different interests involved when the State has responsibility to act *in loco parentis*.

To defeat a claim of qualified immunity, the contours of an alleged constitutional right must be "sufficiently clear that

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2. One federal appellate decision in 1992 held that "law enforcement officers *may conduct* a strip search of a juvenile in custody, even for a minor offense, based upon reasonable suspicion to believe that the juvenile is concealing weapons or contraband." *Justice v. City of Peachtree*, 961 F.2d 188, 193 (11th Cir.1992) (emphasis added). The Eleventh Circuit said that "the strip search of a juvenile based on less than probable cause 'instinctively gives us the most pause,' " *id.* (quoting *Bell v. Wolfish*, 441 U.S. at 558, 99 S.Ct. 1861), but the court neither reached a holding nor uttered further *dictum* on the constitutionality of strip searching juveniles at a police station, without probable cause, after an arrest for a minor offense. Uncertain *dictum* from a different circuit on a search arising in a different context surely did not establish clearly as of 1999 that strip searches at the Juvenile Detention Center in Minnehaha County were unreasonable.

a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Qualified immunity analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Here, no governing appellate decision had decided how to strike the "reasonableness" balance in the situation of juvenile detainees, and as late as 2004, the Second Circuit concluded not only that the asserted right of juvenile detainees to be free from strip searches was not clearly established, but that the right did not even exist. The conclusion in *N.G.*, at a minimum, was within the range of objectively reasonable determinations that an official might have reached about the lawfulness of strip searches at the JDC in 1999. Even if we have misapprehended how the Supreme Court would resolve the "reasonableness" balance on Smook's claim, we reach the alternative conclusion that Banbury and Cheever are entitled to qualified immunity for allegedly acting in a manner consistent with, or less intrusive than, a practice that the Second Circuit later held to be reasonable and constitutional.

In addition to granting partial summary judgment in favor of Smook, the district court's order also granted partial summary judgment for unnamed class members who, as the class was defined by the court, were strip searched at the JDC from June 1, 1999, through September 14, 1999. Banbury and Cheever contend that they are also entitled to qualified immunity from suits for damages by the unnamed class members. To review that contention, it appears that we would be required by the Supreme Court's current direction

to resolve first whether the searches of the unnamed class members violated the Fourth Amendment, and then, if so, whether the defendants are nonetheless entitled to qualified immunity. *See Brosseau v. Haugen*, 543 U.S. 194, 197-98 & n. 3, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam); *Saucier*, 533 U.S. at 200, 121 S.Ct. 2151; *see also Bunting v. Mellen*, 541 U.S. 1019, 1024-25, 124 S.Ct. 1750, 158 L.Ed.2d 636 (2004) (Scalia, J., dissenting from denial of certiorari).

The requirement to resolve the reasonableness of these searches of unnamed class members places us in a quandary. The specific facts underlying the claims are not yet developed, and the reasonableness of a particular search is often highly contextual. We do not know from this record which, if any, of the unnamed class members were searched after removing all of their clothing, what might have led staff members at the JDC to conduct such searches (*e.g.*, whether they simply followed a policy by rote, or whether they exercised discretion based on such factors as whether particular undergarments were unusually capable of concealing contraband), whether any such searches may have involved reasonable suspicion, probable cause, or consent, and so forth. Plaintiffs contend that "[t]he question of whether individual class members were required to be completely nude or nearly nude will be determined among the factual matters during the damages phase of the case," (Appellees' Br. at 14 n.8), yet the entitlement to qualified immunity is an *immunity from suit*, not merely a defense to liability, *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), and the individual defendants are thus entitled to a decision before the litigation proceeds to that phase.

The posture of the appeal is complicated further by our decision that the named class representative, Smook, has no claim for damages against the defendants. That conclusion typically would disqualify her as a class representative, *see, e.g., E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403-04, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977); *Burris v. First Fin. Corp.*, 928 F.2d 797, 806 (8th Cir.1991), but given that a class already has been certified, "the class of unnamed persons described in the certification acquire a legal status separate from the interest asserted by [Smook]." *Sosna v. Iowa*, 419 U.S. 393, 398, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). This separate legal status means that the dismissal of Smook's claim does not inexorably require dismissal of the class action, *id.* at 399-401, 95 S.Ct. 553; *Rodriguez*, 431 U.S. at 406 n. 12, 97 S.Ct. 1891; *but cf. Great Rivers Coop. of Southeastern Iowa v. Farmland Indus., Inc.*, 120 F.3d 893, 899 (8th Cir.1997), but it also does not mandate that we decide constitutional issues in the abstract or in a context that may be hypothetical. *See Kremens v. Bartley*, 431 U.S. 119, 134, 97 S.Ct. 1709, 52 L.Ed.2d 184 (1977) ("While there are 'live' disputes between unnamed members of the class certified by the District Court, on the one hand, and [defendants], on the other, these disputes are so unfocused as to make informed resolution of them almost impossible.").

Under these unusual circumstances, we decline to pass on the merits of the constitutional claims of the unnamed class members that must be resolved as a first step in determining whether Banbury and Cheever are entitled to qualified immunity from suit. Because we decline to resolve this aspect of the appeal by the individual defendants, we

dismiss for lack of jurisdiction that portion of the county's appeal regarding liability for damages to the unnamed class members. On remand, the district court may consider, after pausing to "stop, look, and listen," *id.* at 135, 97 S.Ct. 1709, whether the class should be redefined or decertified, *cf. Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), and whether there is an adequate class representative to replace Smook, if appropriate. *Cf. Howe v. Varity Corp.*, 896 F.2d 1107, 1111 (8th Cir.1990). If the court concludes that a class should continue to be certified and there is an adequate class representative to continue the action, then the defendants, of course, may renew motions for summary judgment if they wish. We expect that the district court would consider any such motions in light of our conclusions regarding the individual defendants' entitlement to qualified immunity from suit on Smook's claim.

B.

The defendants also appeal the district court's finding of liability on the plaintiffs' claims for injunctive relief with respect to future searches of juveniles detained for "minor offenses." This appeal includes a challenge to the district court's conclusion that the JDC may not, consistent with the Constitution, conduct future searches comparable to the search of Smook. As to that aspect of the appeal from the district court's determinations concerning injunctive relief, we agree with the parties that the issues of law are "inextricably intertwined" with the determination of whether Banbury and Cheever are entitled to qualified immunity on Smook's claim for damages, such that appellate jurisdiction is proper. *See Gardner v. Howard*, 109 F.3d 427, 431 (8th

Cir.1997); *Kincade*, 64 F.3d at 394-95. Before we may reach the merits, however, we must first satisfy ourselves that the action for injunctive relief presented a "case or controversy" over which the district court properly exercised Article III jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Having carefully reviewed Smook's complaint with that question in mind, we conclude that she and the class certified by the district court lack standing to seek injunctive relief.

The allegations of the complaint relate entirely to past conduct by the defendants that occurred when Smook and others were arrested for minor offenses in August 1999. The district court's order certifying a class defined the relevant class as encompassing "all persons seeking injunctive relief who, when they [were] under the age of eighteen years old, were charged with minor offenses and were, pursuant to JDC policy strip searched . . . at the Minnehaha County Juvenile Detention Center from June 1, 1999 through September 14, 1999." There is no allegation about the likelihood of future contact with the JDC or future unreasonable searches.

It is well settled that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). There is no allegation in the complaint that Smook or the certified class members are suffering any "continuing, present adverse effects" from searches conducted between June 1 and September 14, 1999. There is no assertion that the plaintiffs expect to commit additional minor offenses in Minnehaha

County, or that they are likely to be detained at the JDC. And there is no allegation that if the plaintiffs were detained at the JDC for a minor offense in the future, then they would be unable to take advantage of the two-hour grace period for parental pick-up, which now permits a juvenile to avoid any kind of search when detained for a minor offense. Even if the face of the complaint did include a general assertion of future injury, we think that attempting to anticipate whether any of the plaintiffs would actually be detained and strip searched would take us "into the area of speculation and conjecture." *Id.* at 497, 94 S.Ct. 669; *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) ("That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistence on his part."); *Hedgepeth v. Washington Metro. Transit Auth.*, 386 F.3d 1148, 1152 (D.C.Cir.2004) (Roberts, J.).

Absent a sufficient allegation that Smook and other class members are likely to be strip searched at the JDC in the future, they are "no more entitled to an injunction than any other citizen." *Lyons*, 461 U.S. at 111, 103 S.Ct. 1660. And "a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of [juvenile detention officials] are unconstitutional." *Id.* The Supreme Court has explained that this limitation on the authority of the federal courts does not mean that "undifferentiated claims

should not be taken seriously by local authorities," for "the interest of an alert and interested citizen is an essential element of an effective and fair government." *Id.* Indeed, in this very case, the claims by Jodie Smook that she was unreasonably searched at the JDC triggered a modification of the institution's policy on searching minors, and prompted a statewide discussion that culminated in legislation prohibiting strip searches, without probable cause, of juveniles detained for curfew violations. But a federal court "is not the proper forum to press such claims unless the requirements for entry and the prerequisites for injunctive relief are satisfied." *Id.* at 112, 103 S.Ct. 1660. We therefore conclude that the plaintiffs' claims for injunctive relief should be dismissed for lack of an Article III case-or-controversy.

* * * * * *

For the foregoing reasons, the decision of the district court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION DATED JANUARY 20, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

No. CIV. 00-4202

JODIE SMOOK, Individually and on behalf of all other persons similarly situated,

Plaintiffs,

v.

MINNEHAHA COUNTY, SOUTH DAKOTA; JIM BANBURY, in his individual capacity; TODD CHEEVER, as Director of Minnehaha County Juvenile Detention Center; and JOHN and JANE DOE Detention Center Officers,

Defendants.

Jan. 20, 2005

MEMORANDUM OPINION AND ORDER

PIERSOL, *Chief Judge.*

Defendants filed a Motion to Reconsider, Doc. 129, asking that the Court reconsider its ruling on the summary judgment motions in this case in light of the Second Circuit

Appendix B

Court of Appeals' decision in *N.G. v. Connecticut*, 382 F.3d 225 (2d Cir.2004), issued on September 7, 2004. (Memorandum Opinion and Order, Doc. 116, September 27, 2004.) The motion has been fully briefed and having carefully considered the parties' arguments and the entire record in this case, the Court has considered the Motion to Reconsider and it is granted to the extent that liability on Plaintiffs' Fourth Amendment claim and the qualified immunity issue are reconsidered on the merits. After such reconsideration, the Court again finds that Defendants are liable on Plaintiffs' Fourth Amendment claim and that Defendants Jim Banbury and Todd Cheever are not entitled to qualified immunity on Plaintiffs' Fourth Amendment claim.

BACKGROUND

On September 27, 2004, the Court held that the Juvenile Detention Center's ("JDC") blanket policy of strip searching minors arrested for minor or non-felony offenses, without any individualized determination of reasonable suspicion that the individual was or is likely to be carrying or concealing weapons, drugs or other contraband, violates the Fourth Amendment. *See Smook v. Minnehaha County*, 340 F.Supp.2d 1037, 1050 (D.S.D.2004). The Court applied the balancing test in *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), to determine whether the JDC's strip search policy in existence at the relevant time period violated the Fourth Amendment:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the

particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

See Smook, 340 F.Supp.2d at 1042-43 (quoting *Bell*, 441 U.S. at 559, 99 S.Ct. 1861). The Second Circuit applied the "overarching principle" set forth in *Bell* in conducting " 'a fact-specific balancing of the intrusion ... against the promotion of legitimate governmental interests.' " *N.G. v. Connecticut*, 382 F.3d at 230-31 (quoting *Board of Education v. Earls*, 536 U.S. 822, 829, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002)). The Second Circuit held that "[a]ssessing all of the circumstances—the risks to the psychological health of the children from performing the searches and the risks to their well-being and to institutional safety from not performing the searches, we conclude that the strip searches upon initial admission do not violate Fourth Amendment standards." *N.G. v. Connecticut*, 382 F.3d at 237. The Second Circuit did not evaluate the facial validity of the strip search policy, but held that two of the strip searches involved in that case did not violate the Fourth Amendment. *See id.* at 230 n. 6. In the present case, the Court evaluated both the facial validity of the JDC's strip search policy and the strip search of Plaintiff Smook. Under the facts of the present case, the Court reached the opposite conclusion from the Second Circuit in conducting the fact-specific balancing of the intrusion of the privacy of Plaintiff Smook and other juveniles admitted to the JDC against the promotion of JDC's legitimate governmental interests. *See Smook*, 340 F.Supp.2d at 1050.

Appendix B

DISCUSSION

Defendants brought their motion for reconsideration under Rule 54(b) of the Federal Rules of Civil Procedure. The Court recognizes that it may reconsider its rulings on the summary judgment motions because judgment adjudicating all the claims and the rights and liabilities of all the parties has not been entered in this case. Fed.R.Civ.P. 54(b).

A. Liability on Fourth Amendment Claim

The initial issue to be addressed is Defendants' failure to recognize the Court's factual findings regarding the breadth of the JDC's strip search policy in existence at the relevant time period. While Defendants continue to repeatedly assert in their brief that the strip search policy in effect at the time of Plaintiff's search did not require juveniles to remove their undergarments, Defendants disregard the evidence on record and the Court's finding that the written policy in effect at that time did require juveniles to remove their undergarments while being strip searched. *See Smook*, 340 F.Supp.2d at 1040. Thus, Defendants' contention that the strip search policy in this case was less intrusive than the strip searches held constitutional by the Second Circuit is erroneous. To argue that the Court was wrong in its fact finding is one way to approach that issue. To fail to even acknowledge the facts as found by the Court results in a brief that is of no assistance to the Court.

The Court acknowledges the Second Circuit's statement that "[s]trip searches of children pose the reasonableness

inquiry in a context where both the interests supporting and opposing such searches appear to be greater than with searches of adults confined for minor offenses." *N.G. v. Connecticut*, 382 F.3d at 232. The Second Circuit's decision, however, does not convince the Court that the JDC's strip search policy results in reasonable searches under Fourth Amendment standards. The dissent in *N.G. v. Connecticut*, 382 F.3d at 238-45, articulates much of this Court's disagreement with the Second Circuit's decision. Specifically, the Court agrees with the dissent in *N.G. v. Connecticut*, that the majority opinion "overstates the relevance" of several non-prison cases upholding drug testing of students or employees who have voluntarily engaged in the job or activity that required testing and "downplays the significance of the most closely analogous case it cites, *Justice v. City of Peachtree City*, 961 F.2d 188, 193 (11th Cir.1992)." *N.G. v. Connecticut*, 382 F.3d at 241 (dissenting opinion). This Court does respectfully submit that the majority opinion in *N.G. v. Connecticut*, fails to adequately credit the fact that juveniles are not young adults. Harsh and potentially scaring treatment of juveniles suspected of minor offenses, such as driving while revoked, cannot be justified by an *in loco parentis* rationale when the primary approach of the government personnel is one of juvenile law enforcement. Those government officials should be more attuned to the different susceptibilities of juveniles as opposed to treating juveniles as people with fewer rights as to their person when compared with adults. Additionally, similar to the dissent in *N.G. v. Connecticut*, 382 F.3d at 241, the Eighth Circuit recently recognized the distinction between being subjected to a search at the hands of State officials in a situation where one voluntarily participates in an activity that requires random

searches compared to being searched without having voluntarily participated in the activity allowing for random searches. *See Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 353-54 (8th Cir.2004).

The Eleventh Circuit's opinion in *Justice*, *supra*, was relied upon by the Court in weighing the various interests in this case to determine whether the JDC's policy violated the Fourth Amendment. *See Smook*, 340 F.Supp.2d at 1047-48. The Second Circuit's opinion does not alter the Court's view of the soundness of the principles recognized by the Eleventh Circuit in *Justice*, 961 F.2d at 193, or that decision's relevance to the question of whether the JDC's strip search policy in this case is unconstitutional. As recognized by the Eleventh Circuit, "[i]t is axiomatic that a strip search represents a serious intrusion upon personal rights." *Id.* at 192. In discussing the seriousness of a strip search of a juvenile, the Eleventh Circuit recognized that " '[c]hildren are especially susceptible to possible traumas from strip searches. . . . "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." ' " *Id.* at 192-93 (citations omitted).

In addition to the Eleventh Circuit's opinion in *Justice*, 961 F.2d at 193, the Court relied upon the Eighth Circuit's decision in *Jones v. Edwards*, 770 F.2d 739, 741 (8th Cir.1985), in holding that the JDC's policy is unconstitutional. Similar to the arguments in *Jones*, the Defendants in this case raise security concerns as a justification for their blanket strip search policy. In *Jones*, the court rejected the argument that security concerns could

justify a blanket policy of strip searching all persons arrested for minor offenses who were admitted to the jail without some individualized suspicion. 770 F.2d at 771-72. In an attempt to distinguish *Jones* from the present case, Defendants assert that the State has a higher governmental interest in protecting the security of juvenile detainees than it does in protecting adult detainees. Whether the Defendants have a heightened duty to protect juveniles, however, does not translate into higher security concerns and more intrusive searches. In discussing the serious security dangers in a detention center, police station or jail holding cell, the Eleventh Circuit held that, "[t]he considerations regarding contraband are the same whether the detainee is a juvenile or an adult." *Justice*, 961 F.2d at 193. The Court concurs with the Eleventh Circuit that officials in charge of a juvenile detention facility and an adult prison or jail have the same security concern: assuring that weapons and other contraband are not introduced into the secure facilities. Although controlling the admission of weapons and other contraband into the JDC present legitimate security concerns, as in *Jones*, these security concerns do not justify a blanket policy of strip searching all juveniles admitted to the JDC for non-felony and minor offenses.

The Defendants assert that, "[i]f the JDC abides by this Court's current holding and only searches juveniles when it has a reasonable suspicion to believe that they possess weapons or contraband, *undoubtedly*, some weapons and contraband will find their way into the JDC facility." (Defendants' Brief in Support of Motion for Reconsideration Under Rule 54(b), Doc. 130 at p. 10 (emphasis added).) The Court has already concluded, however, that the record in this

case does not demonstrate that the incidence of smuggling weapons or contraband into the JDC is more than minimal. *See Smook*, 340 F.Supp.2d at 1045. There is an absence of evidence in the record to support the Defendants' broad prediction of what might happen if JDC staff are required to have reasonable suspicion before strip searching juveniles charged with minor or non-felony offenses.

In support of their claim that it is necessary to search all juveniles for weapons and other contraband, Defendants submitted an Affidavit of Todd Cheever, Doc. 88, the current Director of the JDC. He states that, "[u]pon admission to the JDC, juveniles *sometimes* attempt to introduce weapons or contraband into the facility." (Doc. 88, ¶ 3 (emphasis added).). Cheever further states that he has in his possession at the JDC "a large box of weapons and contraband representing materials found on admittees over the years." (Doc. 88, ¶ 4.) As the Court initially concluded, this evidence does not demonstrate that the incidence of smuggling weapons or contraband into the JDC is more than minimal. This evidence is inconclusive as to the time period within which the *one* large box of weapons or contraband was collected as well as what was contraband and what were weapons. More critical, this evidence fails to show that the weapons or contraband were seized from juveniles charged with non-felony or minor offenses or that the weapons or contraband were discovered as a result of strip searches, rather than other less invasive searches that may be constitutionally performed by JDC staff. Thus, similar to the state officials in the Eighth Circuit's recent case, *Doe*, 380 F.3d at 352-53, the Defendants have, "in fact failed to demonstrate the existence of a need sufficient to justify the

substantial intrusions upon the [juvenile]'s privacy interests that the search practice entails."

Another consideration the Defendants suggest should weigh heavily in favor of the reasonableness of the strip search policy is that the State acts as a *de facto* guardian of children lawfully removed from their home when they are in the custody of the JDC. The Defendants do not address, however, the distinction in the reasonableness inquiry the Eighth Circuit made from searches that, "can lead directly to the imposition of punitive criminal sanctions," from searches that will not lead to criminal sanctions. *Doe*, 380 F.3d at 355. If a search can lead to criminal sanctions, "[r]ather than acting *in loco parentis*, with the goal of promoting the students' welfare, the government officials conducting the searches are in large part playing a law enforcement role with the goal of ferreting out crime and collecting evidence to be used in prosecuting students." *Id.* Significantly, the JDC's written policy required law enforcement to remain at the JDC until a search was completed and required JDC staff to give any illegal contraband to the law enforcement officer:

> Only after the completion of the search is the officer to depart from the Center. Any illegal contraband (i.e. drug, weapons) found on a juvenile is to be taken by the police officer. If it was necessary for the officer to leave prior to the search and contraband is found, contact the officer to come back and pick up the contraband. It is the officer's decision regarding further charges.

(Doc. 95, Ex. C at D 067.) Similar to the search policy in *Doe, supra,* the JDC's policy demonstrates that it is in large part playing a law enforcement role with the goal of ferreting out crime and collecting evidence to be used to prosecute the juveniles admitted to the JDC. Thus, in considering the character of the intrusion the JDC's strip search policy imposes, the JDC's law enforcement purposes for which the fruits of the strip searches are used does not weigh in favor of concluding that the invasion of the juveniles' privacy was insignificant.

The Defendants do not acknowledge the law enforcement purposes for conducting the strip searches at issue in this case and how the that purpose relates to the JDC's asserted purpose for conducting the strip searches, i.e. acting *in loco parentis.* Likewise, the Second Circuit in *N.G. v. Connecticut,* discusses a juvenile detention's responsibility to act *in loco parentis,* but it does not discuss how this responsibility relates to the law enforcement purposes for conducting strip searches on juveniles admitted for minor or non-felony offenses. 382 F.3d at 232. Thus, neither the Defendants nor the Second Circuit have evaluated a consideration that the Eighth Circuit has found highly relevant in evaluating the reasonableness of searches involving juveniles under the Fourth Amendment. *See Doe,* 380 F.3d at 355.

Another issue raised by Defendants is that they must be "alert for children who are angry about the arrest, violent, depressed, suicidal, gang members, under the influence of drugs or alcohol, etc." (Defendants' Brief, Doc. 130, at p. 8.) The fallacy with this argument is that if a juvenile being admitted to the JDC displays the behaviors or raises such

concerns, JDC staff may have reasonable suspicion that such a juvenile is carrying or concealing weapons or contraband and a strip search would be allowed under the Court's holding. It is important to recognize that the Court's ruling does not prohibit all strip searches. Rather, the Court's holding requires a finding of individualized reasonable suspicion of carrying or concealing weapons or other contraband *before* conducting a strip search of a juvenile arrested for a minor or non-felony offense. Moreover, the Court's holding does not prohibit strip searching juveniles arrested for more offenses more serious than minor or non-felony offenses as those offenses are defined in the class definitions.

Defendants again assert that they must strip search all juveniles to allow JDC staff to detect abuse or neglect of juveniles. This argument was examined and rejected by the Court in the decision denying summary judgment to Defendants. *See Smook*, 340 F.Supp.2d at 1045. As the Court found, JDC staff do not have a *duty to detect* abuse or neglect of juveniles. *See id.* Moreover, there is no evidence in this record to demonstrate that JDC staff must conduct a strip search to detect abuse or neglect, rather than conducting a search or examination far less invasive than a strip search. While Defendants are attempting in this Motion to Reconsider to justify the JDC's strip search policy based upon a supposed "duty to detect abuse or neglect," Defendants do not address the harm inflicted on juveniles by a strip search, much less the harm that a strip search would cause an abused or neglected child. *See Justice*, 961 F.2d at 192-93 (recognizing that children are especially susceptible to possible traumas from strip searches).

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In addition to the considerations discussed above, in denying Defendants' summary judgment motion on the strip search claim, the Court relied on several circuit court decisions (cited in footnote one below) that held strip searching arrestees of minor offenses without reasonable suspicion that an arrestee is carrying or concealing a weapon or other contraband violates that arrestee's Fourth Amendment rights. *See Smook*, 340 F.Supp.2d at 1043-46. While not repeated here, that decisional law was considered again in ruling on the Motion to Reconsider.

Having reconsidered the issue of the constitutionality of the JDC's strip search policy, and balancing the JDC's interests against the interests of the class members, the Court again holds that the JDC policy violates the class members' Fourth Amendment rights and that Plaintiff Smook's Fourth Amendment rights were violated when she was searched on August 9, 1999. The Court adheres to the prior holding that a minor charged with minor or non-felony offenses may be subjected to a strip search only if JDC officials possess a reasonable suspicion that the minor is carrying or concealing a weapon or other contraband. *See Smook*, 340 F.Supp.2d at 1046-47.

B. Qualified Immunity

The final issue to be decided on this motion for reconsideration is whether, in light of the Second Circuit's decision, Defendants Banbury and Cheever are entitled to qualified immunity. A two-part analysis is used to evaluate a qualified immunity defense: "[f]irst, [the court] must determine whether the plaintiff has alleged the violation of a

constitutional right. Second, [the court] must determine whether that right was clearly established at the time of the alleged violation." *Manzano v. South Dakota Dep't of Soc. Serv.*, 60 F.3d 505, 509 (8th Cir.1995) (citations omitted). The qualified immunity defense is evaluated based upon the law existing at the time of the alleged violation. *See Sexton v. Martin*, 210 F.3d 905, 909-10 (8th Cir.2000) (explaining that, "[i]t is only necessary that the unlawfulness of the official's act [be] apparent *in view of pre-existing law.*") (emphasis added). The class period began on November 1, 1997, as to minor offenses and on April 16, 1999, as to non-felony offenses. The strip search of the Plaintiff was conducted on August 9, 1999. Although the Court has not yet set the ending date for the class period, the Court has been advised that the strip search policy was changed as of December 31, 2003. (See Plaintiffs' Reply Memorandum, Doc. 125, November 15, 2004.) Thus, it questionable whether the Court should consider the Second Circuit's 2004 decision in *N.G. v. Connecticut*, 382 F.3d at 237, in determining what the state of the law was at the time of the alleged violations in this case.

As to the first part of the qualified immunity analysis, the Plaintiff, on behalf of herself and the class members, allege a violation of the Fourth Amendment of the United States Constitution, satisfying the first part. Thus, the remaining issue is whether it was clearly established during the class period that the JDC's written policy of strip searching juveniles admitted to the JDC on minor or non-felony offenses and without individualized suspicion that such juveniles were carrying or concealing weapons or other contraband violated the Plaintiff's and class members' Fourth

Amendment rights. *See Sexton*, 210 F.3d at 910 (holding that, "if the law claimed to have been violated was clearly established, the qualified immunity defense ordinarily fails, 'since a reasonably competent public official should know the law governing his conduct.' ") (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

Discussing the "clearly established" requirement in the context of a qualified immunity defense, the Supreme Court explained that, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful ... but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The lack of a Supreme Court decision does not prevent a finding that a right is clearly established. The Eighth Circuit recognized that in determining whether a right is clearly established for purpose of the qualified immunity defense, "[i]n the absence of binding precedent, a court should look to all available decisional law including decisions of state courts, other circuits and district courts. . . ." *Burnham v. Ianni*, 119 F.3d 668, 677 (8th Cir.1997) (quotation marks and citations omitted). The Eighth Circuit explained that in determining whether a right is "clearly established" in this circuit, the Court is to apply "a flexible standard, requiring 'some, but not precise factual correspondence' with precedent, and demanding that officials apply general, well-developed legal principles." *J.H.H. v. O'Hara*, 878 F.2d 240,

243 (8th Cir.1989). In addition, the Eighth Circuit further explained that it, " 'has ... taken a broad view of what constitutes "clearly established law" for the purposes of a qualified immunity inquiry. . . .' " *Sexton*, 210 F.3d at 909 (quoting *Boswell v. Sherburne County*, 849 F.2d 1117, 1121 (8th Cir.1988)).

In the Court's decision denying summary judgment on the strip search claim, eight federal courts of appeals' decisions were cited, in addition to the Eighth Circuit's decision in *Jones*, 770 F.2d at 742, that have held strip searching arrestees of minor offenses without reasonable suspicion that an arrestee is carrying or concealing a weapon or other contraband violates that arrestee's Fourth Amendment rights.[1] *See Smook*, 340 F.Supp.2d at 1043-44.

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1. *See Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir.1989) (holding that, "a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence and concerning whom there is no individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband, is unreasonable [under the Fourth Amendment]."); *Chapman v. Nichols*, 989 F.2d 393, 395-97 (10th Cir.1993) (ruling that a strip search of arrestees pursuant to a jail's blanket policy requiring all detainees, including those arrested for minor traffic offenses and awaiting bail, to be subject to a strip search violated the plaintiffs' Fourth Amendment rights); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir.1986) (holding that strip-body cavity search of arrestee who had been arrested for misdemeanor offenses was unconstitutional where jail authorities has no reasonable suspicion that arrestee was concealing weapons or other contraband); *Stewart v. Lubbock County, Texas*, 767 F.2d 153, 156-57 (5th Cir.1985) (strip search policy applied to minor offenders awaiting bond when no reasonable suspicion existed that they as a category of offenders or

(Cont'd)

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The Court also cited a 1992 Eleventh Circuit Court of Appeals decision, in which it was held that strip searches of incarcerated juveniles will be upheld, but such searches require a showing of reasonable suspicion of possession of contraband. *See id.*, at 1048 (citing *Justice*, 961 F.2d at 190-91).

It is clear from the Court's discussion of *Jones* above that there is "some, but not precise factual correspondence" to this case. The factual correspondence between this case and *Jones* is that the plaintiffs were arrested for minor and non-felony offenses, they were held in custody, they were strip searched without individualized suspicion that they were carrying or concealing weapons or other contraband, the security purposes for the searches were the same, and if the state official performing the strip searches found any illegal items, those items would be seized by law enforcement

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(Cont'd)

individually might possess weapons or contraband violated the Fourth Amendment); *Giles v. Ackerman*, 746 F.2d 614, 615 (9th Cir.1984) (strip search of person arrested for minor traffic offenses held unconstitutional in absence of individualized suspicion) (overruled on other grounds); *Hill v. Bogans*, 735 F.2d 391, 394-95 (10th Cir.1984) (held that routine strip searches in public area of persons detained for minor traffic offenses is unreasonable under Fourth Amendment); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir.1983) (strip search of misdemeanor offenders who were not inherently dangerous and who were being detained only briefly while awaiting bond violated the Fourth Amendment); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir.1981) (strip search of DWI arrestee was held unconstitutional). Common sense should guide those regularly dealing with juveniles that juveniles surely should not be treated more harshly than adults.

officials and could result in criminal charges. The primary distinction advanced by Defendants is that *Jones* involved an adult rather than a juvenile arrestee. This distinction is based upon the Defendants' responsibility to act *in loco parentis* over juveniles, which, Defendants contend, heightens the Defendants' interest in locating weapons or contraband concealed by juveniles being admitted to the JDC to protect the juvenile being searched and the other juveniles in custody. The Eleventh Circuit, however, specifically held that the security interests in performing strip searches of juveniles and adults in custody is the same. *See Justice*, 961 F.2d at 193. Despite the asserted distinction between searching adults and juveniles, the Court finds that there is at least "some, but not precise factual correspondence" between *Jones* and this case and that the unlawfulness of the JDC's blanket strip search policy was apparent. *J.H.H.*, 878 F.2d at 243.

Moreover, from the "general, well-developed legal principles," *id.*, involving strip searches of persons arrested for minor offenses in the absence of individualized suspicion established by the all of the courts of appeals' decisions examined in the Court's decision on the summary judgment motions, a reasonable official would understand that the JDC's blanket strip search policy applied to juveniles arrested for minor or non-felony offenses violates those juveniles' Fourth Amendment rights.

Other than the Second Circuit's 2004 decision, the Defendants cannot cite to any case law with "some, but not precise factual correspondence" with the present case that holds a blanket strip search policy similar to the JDC policy

at issue here is constitutional. In its 2004 decision, the Second Circuit acknowledged that it was not aware of an appellate ruling on the reasonableness of strip searches of juveniles in lawful state custody, *in the absence of individualized suspicion* of possession of contraband. *N.G. v. Connecticut*, 382 F.3d at 233 (emphasis added). Likewise, the Court is unaware of any circuit ruling, prior to the issuance of the Second Circuit's opinion, finding constitutional a strip search of a juvenile admitted to a juvenile detention facility who was arrested for minor or non-felony offenses in the absence of individualized suspicion of possession of weapons or other contraband.

The Court concludes that, having reexamined the grounds for denying qualified immunity in the initial decision, even in light of the decision in *N.G. v. Connecticut*, Defendants Banbury and Cheever are not entitled to qualified immunity in this action. In light of the Eighth Circuit's decision in *Jones*, 770 F.2d at 742, the Eleventh Circuit's decision in *Justice*, 961 F.2d at 193, the eight other courts of appeals decisions cited by the Court in footnote 1, and the lack of an appellate ruling that a strip search of a juvenile in lawful state custody in the absence of individualized suspicion of possession of a weapon or other contraband until 2004, the Court finds the law was clearly established beginning in 1986 that JDC's policy of strip searching juveniles arrested for minor or non-felony offenses, without any individualized suspicion of possession of weapons or other contraband, violated such juveniles Fourth Amendment rights. *See Jones*, 770 F.2d at 742 n. 4 (denying qualified immunity to jail officials who conducted a strip search in 1981 on a person arrested for minor offenses without any suspicion that he was harboring weapons or contraband and holding that "the fourth amendment's protection against the kind of search

of which Jones complains was well-established at the time his search took place."). Based upon the Court's discussion above, it cannot be said that Defendants Banbury's and Cheever's actions " 'could reasonably have been thought consistent with the rights they are alleged to have violated.' " *Gregoire v. Class*, 236 F.3d 413, 417 (8th Cir.2000) (quoting *Anderson*, 483 U.S. at 638, 107 S.Ct. 3034). The Court has considered the Motion to Reconsider on the issue of qualified immunity. Upon reconsideration, qualified immunity is again denied. Accordingly,

IT IS ORDERED:

(1) That the Defendants' Motion for Reconsideration, Doc. 129, is granted to the extent that the Court has reconsidered its ruling on the summary judgment motions as set forth in the Court's Memorandum Opinion and Order, Doc. 116, as to Plaintiffs' Fourth Amendment claim and the qualified immunity issue, and the Motion for Reconsideration is denied in all other respects.

(2) That after having considered Defendants' Motion for Reconsideration, Doc. 129, the Court again: (a) holds that the Minnehaha County Juvenile Detention Center's blanket policy of strip searching minors arrested for minor or non-felony offenses, without any individualized determination of reasonable suspicion that the individual was or is likely to be carrying or concealing weapons, drugs or other contraband, violates the Fourth Amendment; (b) holds that the strip search of Plaintiff, Jodie Smook, violated her Fourth Amendment rights; and (c) denies qualified immunity to Defendants Jim Banbury and Todd Cheever on Plaintiffs' Fourth Amendment claim.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION DATED SEPTEMBER 27, 2004

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

No. CIV. 00-4202

JODIE SMOOK, Individually and on behalf of all other persons similarly situated,

Plaintiffs,

v.

MINNEHAHA COUNTY, SOUTH DAKOTA; JIM BANBURY, in his individual capacity; TODD CHEEVER, as Director of Minnehaha County Juvenile Detention Center; and JOHN and JANE DOE Detention Center Officers,

Defendants.

Sept. 27, 2004

MEMORANDUM OPINION AND ORDER

PIERSOL, *Chief Judge.*

Plaintiff filed a Motion for Partial Summary Judgment, Doc. 91, seeking summary judgment on the Fourth Amendment claims in this action. Defendants filed a Motion

for Summary Judgment, Doc. 110, seeking summary judgment on all of the claims in this action. Plaintiff also filed a Motion to Strike the Defendant's Expert Report, Doc. 101. The motions have been fully briefed and the Court does not find that oral argument is necessary to decide the pending motions. For the reasons set forth below, the Court will grant Plaintiff's motion, grant Defendants' motion as to the claims of the third and fourth classes certified by the Court and deny Defendants' motion as to the claims of the first and second classes certified by the Court. The motion to strike will be denied.

BACKGROUND

This is a class action involving allegations that Plaintiff Jodie Smook and the other class members were deprived of their constitutional rights by being strip searched and questioned about their religious beliefs and practices, pursuant to institution policies, when admitted to the Minnehaha County Juvenile Detention Center ("JDC") for minor offenses in 1999. Smook asserts that she and three of her friends were arrested by Sioux Falls policemen for curfew violations on August 8, 1999. The four teenagers were taken to the JDC where they were questioned about their religious beliefs and practices, individually ordered into a bathroom, and strip searched.

The JDC had a policy of conducting visual strip searches of all minors regardless of the type of offense they were arrested for or whether there was reason to believe that the minors had weapons or contraband. The JDC also had a policy of questioning juvenile detainees about their religious

beliefs and practices. The written strip search policy in effect on August 9, 1999, when Plaintiff was arrested, required a JDC staff person to escort the juvenile to the JDC's shower room, and instruct the juvenile to remove all of his or her clothing, including undergarments. The JDC staff person then conducted a thorough visual inspection of the juvenile's naked body. The juvenile was required to comb through and, if necessary, lift his or her hair and to turn around. The juvenile was required to take a shower in full view of the JDC staff. A complete search of the juvenile's clothing was also conducted by JDC staff. A JDC uniform was supplied to the juvenile after showering.

Before Plaintiff was taken to the JDC an expansion project was completed to add a new non-secure area to the JDC. Before the expansion project was completed, all minors were admitted to the secure area of the JDC. All minors brought to the JDC before the expansion project were required to take showers and the strip searches described above were conducted on all minors. After the expansion project was completed all minors entered the facility through the non-secure area. Although the written policies regarding strip searches were not changed, some of the JDC officers modified the strip search procedures for those minors not being admitted to the secure area of the JDC.

After the expansion project, some of the strip searches were conducted in a unisex bathroom in the new, non-secure area. A toilet, sink and shower stall were in the bathroom. The shower stall consisted of a brick wall from ceiling to floor, with an open entrance to the stall. If the minor was going to be at the JDC for less than approximately 15 minutes

to one-half hour, some JDC officers did not require that minor to disrobe. Some JDC officers continued to search every minor that entered the JDC, even if the minor was only going to be there for five to ten minutes. If the minor was going to be in the non-secure area for over 15 minutes to one-half hour, but not going to be detained at the JDC, the minor was required to disrobe and be visually searched by a same-sex JDC officer. At least some of the JDC officers allowed these minors to keep their undergarments on while the visual search of the minor's body was conducted. The JDC staff would also search the minor's clothing before returning it to the minor. After both the visual search of the minor's body and the clothing search, the minor was allowed to put on his or her clothes. All searches in the unisex bathroom were conducted by one JDC officer of the same sex as the minor. There were no windows in the bathroom where the strip searches were conducted.

If a minor was going to be admitted to the secure area of the JDC, however, that minor was required to shower and subjected to the strip search procedure described above while showering. Thus, those minors admitted to the JDC even after the expansion project was complete were visually searched while naked by a JDC officer. The majority of the strip searches of minors being admitted to the JDC were conducted in the secure area of the JDC, which was separated into a girls' and boys' wing. Those separate wings contained shower areas that had multiple shower stalls separated by brick walls. The front of the shower was open to allow JDC staff to view the minors as they were showering.

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On September 14, 1999, revised written policies were issued regarding the searching of juveniles brought to the JDC for a minor offense, such as curfew, petty theft, or liquor violations, or as a CHINS child, which is an acronym for children in need of supervision. Rather than being searched soon after arrival at the JDC, these juveniles were given a two-hour grace period to allow JDC staff to determine whether an appropriate adult was available and willing to take custody of the juvenile before a strip search was conducted. If JDC staff could not reach the juvenile's parents or the parents refused to take custody within two hours of being brought to the JDC, that juvenile would be subjected to the same strip search procedure as all other juveniles admitted to the JDC, which included showering and being visually searched while naked.

In September 1999 a change was also made to the procedure for showering juveniles and observing them. A screen was installed in the shower area, which allowed the JDC staff to view the juvenile only from the neck up and the knees down. Consistent with the JDC's past procedure, the juvenile's entire naked body continued to be observed by JDC staff before the juvenile entered the shower. The only exceptions for the showering requirement were if the juvenile was too intoxicated to shower, if medical reasons prohibited showering, or if the juvenile's behavior was such that taking a shower would endanger the juvenile or staff.

Plaintiff Smook was taken to the JDC on August 9, 1999, for a curfew violation, when the above-described written strip search policy was in effect, but after the time when at least some of the JDC officers did not require the minors to remove

their undergarments, despite the existence of the written strip search policy. Plaintiff was one of those minors who was not required to remove her underwear and bra during the search. She was required to remove her shirt, shorts and sandals in a bathroom in the presence of a female JDC officer. When she was wearing her underwear and bra, she was visually inspected by a female JDC officer. The officer informed Plaintiff that she was being searched for drugs, drug paraphernalia and weapons. The JDC officer also touched Plaintiff's hair and toes while searching those areas of Plaintiff's body.

The Court certified four classes in this action, distinguished upon the claims and relief sought. The four certified classes are described as follows:

1. All persons seeking injunctive relief in this action who, when they under the age of eighteen years, were charged with minor offenses from November 1, 1997 to a date to be set by the Court or were charged with non-felony offenses from April 16, 1999 to a date to be set by the Court, and were, pursuant to JDC policy, strip searched at the Minnehaha County Juvenile Detention Center.

2. All persons seeking compensatory and punitive damages in this action who, when they under the age of eighteen years, were charged with minor offenses from November 1, 1997 to a date to be set by the Court or were charged with non-felony offenses from April 16, 1999 to a date to be set by the Court, and were, pursuant to JDC policy, strip searched at the Minnehaha County Juvenile Detention Center.

3. All persons seeking injunctive relief in this action who, when they under the age of eighteen years, were charged with minor offenses from November 1, 1997 to September 14, 1999, or were charged with non-felony offenses from April 16, 1999 to September 14, 1999, and were, pursuant to JDC policy, subjected to questioning about their religious beliefs at the Minnehaha County Juvenile Detention Center.

4. All persons seeking compensatory and punitive damages in this action who, when they under the age of eighteen years, were charged with minor offenses from November 1, 1997 to September 14, 1999 or were charged with non-felony offenses from April 16, 1999 to September 14, 1999, and were, pursuant to JDC policy, subjected to questioning about their religious beliefs at the Minnehaha County Juvenile Detention Center.

The term "minor offenses" in all four certified classes includes the offenses of petty theft, liquor violations, being a runaway and curfew violations. The term "non-felony offenses" in all four certified classes includes the offenses of unamenable, truancy, window peeking, tobacco, driving while revoked, contempt of court-CHINS, contempt of court-delinquent, disturbance of school, damage to private property, damage to public property, false impersonation, delinquent probation violation, delinquent violation court order, CHINS probation violation, CHINS violation court order, unlawful occupancy, failure to appear and disorderly conduct.

Appendix C

DISCUSSION

A. Motion to Strike Expert Report

Plaintiff moved to strike Defendants' expert's report as an improper legal conclusion. The report contains some legal conclusions, but it was considered by the Court for purposes of the summary judgment motion. *See Johnson Group, Inc. v. Beecham, Inc.*, 952 F.2d 1005, 1007 (8th Cir.1991) (holding that although the challenged expert's testimony "may have included inappropriate legal conclusions, we cannot conclude that the district court abused its discretion in admitting the testimony") (citing *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir.1989) ("[a] trial court should exclude an expert opinion only if it is so fundamentally unsupported that it cannot help the factfinder."). As further explained below, however, the Court rejects that portion of Dr. Kehoe's report that opines that the challenged JDC policies and procedures are "neither unconstitutional nor unlawful." (Doc. 90.)

B. Motions for Summary Judgment

Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In reviewing a motion for summary judgment, this Court views the evidence in a light most favorable to the non-moving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). "Once the motion for summary judgment is made and supported, it

places an affirmative burden on the non-moving party to go beyond the pleadings and 'by affidavit or otherwise' designate 'specific facts showing that there is a genuine issue for trial.' " *Commercial Union Ins. Co. v. Schmidt*, 967 F.2d 270, 271 (8th Cir.1992) (quoting Fed.R.Civ.P. 56(e)).

1. Strip Searches

In considering a strip search policy at all federal Bureau of Prison facilities, the Supreme Court established a balancing test courts are to use in determining whether a search is unreasonable:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

In 1985, the Eighth Circuit Court of Appeals held that a district court erred in denying the plaintiff's motion for judgment notwithstanding the verdict where plaintiff had been subjected to a visual strip search after his arrest on a minor offense of violating a leash law. *Jones v. Edwards*, 770 F.2d 739, 741 (8th Cir.1985). A violation of the leash

law was not "the sort of crime to inspire officers with the fear of introducing weapons or contraband into the [jail's] holding cell." *Id.* Plaintiff was arrested at his home early in the morning and officers were with him at every moment after they read him the arrest warrant, which included watching him dress and go to the bathroom. *See id.* The Eighth Circuit concluded that security could not justify the blanket deprivation of constitutional rights that occurred. *See id.* at 742.

In another strip search case, the Sixth Circuit held it was clearly established in October 1986 that "a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence and concerning whom there is no individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband, is unreasonable [under the Fourth Amendment]." *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir.1989). The plaintiff in *Masters* was arrested for failing to appear in court for two traffic tickets. *See id.* at 1250. She was arrested at her home and transported to the corrections building where she was ordered to open her blouse and later subjected to a strip search of her entire body. *See id.* The Sixth Circuit held the defendant county officers and employees were not entitled to qualified immunity on plaintiff's strip search claim. *See id.* at 1257.

In 1993, the Tenth Circuit Court of Appeals held that a strip search of arrestees pursuant to a jail's blanket policy requiring all detainees, including those arrested for minor traffic offenses and awaiting bail, to be subject to a strip search violated the plaintiffs' Fourth Amendment rights.

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Chapman v. Nichols, 989 F.2d 393, 395-97 (10th Cir.1993). In *Chapman*, the plaintiffs were arrested for minor traffic violations, the jail officials had no reasonable suspicion that these particular arrestees were likely to be carrying or concealing weapons or drugs, and the plaintiffs were strip searched pursuant to the jail's blanket policy that all detainees be strip searched. *See id.* at 395. In affirming the denial of qualified immunity to the sheriff, the Tenth Circuit noted that "[e]very circuit court, including our own, which has considered the above circumstances under the *Wolfish* balancing test has concluded that a search under these circumstances is unconstitutional." *Id.* (citing cases from the Courts of Appeals in the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits). The defense of qualified immunity was denied to the defendant sheriff because in light of several circuit court of appeals' decisions, the Tenth Circuit found that a jail official could not have reasonably believed that a strip search policy applied to minor offense detainees, without particularized reasonable suspicion, was lawful, even if conducted in private. *See id.* at 397-98.

In addition to the above decisions, several other federal Courts of Appeals have declared unconstitutional, jail or prison policies allowing or requiring persons arrested for traffic or other minor offenses to be strip searched in the absence of individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband. *See Weber v. Dell*, 804 F.2d 796, 802 (2d Cir.1986) (holding that strip-body cavity search of arrestee who had been arrested for misdemeanor offenses was unconstitutional where jail authorities had no reasonable

suspicion that arrestee was concealing weapons or other contraband); *Stewart v. Lubbock County, Texas*, 767 F.2d 153, 156-57 (5th Cir.1985) (strip search policy applied to minor offenders awaiting bond when no reasonable suspicion existed that they as a category of offenders or individually might possess weapons or contraband violated the Fourth Amendment); *Giles v. Ackerman*, 746 F.2d 614, 615 (9th Cir.1984) (strip search of person arrested for minor traffic offenses held unconstitutional in absence of individualized suspicion) (overruled on other grounds); *Hill v. Bogans*, 735 F.2d 391, 394-95 (10th Cir.1984) (held that routine strip searches in public area of persons detained for minor traffic offenses is unreasonable under Fourth Amendment); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir.1983) (strip search of misdemeanor offenders who were not inherently dangerous and who were being detained only briefly while awaiting bond violated the Fourth Amendment); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir.1981) (strip search of DWI arrestee was held unconstitutional).

The written strip search policy in effect at the time Plaintiff was searched provided that all juveniles admitted to the JDC were to be searched for weapons, contraband and signs of abuse by requiring the juvenile to remove all of his or her clothing, including undergarments; being visually inspected while naked by a JDC staff member; and being observed while taking a shower. This blanket policy applied to minors arrested for minor offenses, such as curfew violations, alcohol violations and to CHINS children, as well as to minors arrested for more serious offenses. Moreover, the policy required JDC staff to conduct these strip searches without regard to whether the JDC staff had any reasonable

individualized suspicion that the juvenile was carrying or concealing a weapon or contraband.

In support of their argument that the strip search policy was constitutional, the Defendants contend they were following nationally recognized standards recommending that all minors be strip searched before they are moved from the admission area to the detention area of the facility. Defendants cite the report prepared by their expert, Charles J. Kehoe, President of the American Correctional Association, who opines that at the time of Plaintiff's arrest, the JDC's policies and procedures were "consistent with national standards and good juvenile detention practices and were not unconstitutional or unlawful." (Kehoe Report at 8.)

Whether the JDC's strip search policy is unconstitutional or unlawful is a legal question for the Court to decide. *See Bell*, 441 U.S. at 559, 99 S.Ct. 1861 (setting forth the balancing test to be applied by courts in determining the reasonableness of a search under the Fourth Amendment); *Jones*, 770 F.2d at 740-42 (applying the *Bell* balancing test). Dr. Kehoe's conclusions that the JDC's policies and procedures were "neither unconstitutional nor unlawful" are legal conclusions and will be rejected to that extent. *See Estes v. Moore*, 993 F.2d 161, 163 (8th Cir.1993) (affirming district court's rejection of an expert's proposed testimony regarding the existence of probable cause for an arrest because it was a legal conclusion rather than opinion testimony). That the JDC's policies may have complied with national standards issued by a trade association or the Department of Justice does not dictate that the policies were constitutional. Rather,

the Court must apply the Supreme Court's balancing test applicable to alleged unconstitutional searches, which is quoted above, to determine whether the strip search policy and the search of Plaintiff violated the Fourth Amendment. *See Bell*, 441 U.S. at 559, 99 S.Ct. 1861.

One of the justifications for the existence of the JDC's strip search policy advanced by the Defendants is that these searches are necessary to detect abuse or neglect, so that JDC staff may comply with state law in reporting such instances, pursuant to SDCL § 26-8A-3. This argument is based upon a faulty premise: that JDC staff have a *duty to detect* abuse or neglect. The statute cited by Defendants in support of this argument provides that any court services officer or law enforcement officer "who [has] reasonable cause to suspect that a child under the age of eighteen has been abused or neglected ... shall report that information [to the proper authorities]." SDCL § 26-8A-3. While JDC staff must be alert to the signs of abuse or neglect of the minors in their care, this statute does not place an affirmative duty on JDC staff to discover abuse or neglect of any minor admitted to the JDC. Although JDC staff may have an interest in discovering child abuse and neglect, the Defendants have not cited and the Court has not found any authority holding that this interest justifies the invasion of the minor's personal rights involved in a strip search. Balancing the JDC's interest in discovering child abuse and neglect against the invasion of the minors' personal rights entailed in a strip search leads this Court to the conclusion that the strip search policy in this case violates the minors' Fourth Amendment rights.

Appendix C

Another argument advanced by the Defendants in support of the constitutionality of the JDC's strip searches is that the searches of juveniles were reasonable administrative searches undertaken to satisfy an important government regulatory interest. The Defendants argue that "strip searches can be conducted on less than probable cause or reasonable suspicion where the government's legitimate security interest outweighs an inmate's privacy interest." (Defendants' Brief in Reply to Plaintiffs' Response to Defendants' Motion for Summary Judgment, Doc. 107.) As explained below, however, the Court does not find in this case that the JDC's legitimate security interest outweighs the minors' privacy interests.

Defendants contend the strip search policy is justified by the JDC's security interest in protecting those in its care, in addition to protecting the JDC staff. The Defendants attempt to distinguish the unconstitutional search in *Jones*, 770 F.2d at 742, from the present case. In that case, the Eighth Circuit held that: "[a]lthough we recognize that the security of detention facilities is an important concern of correction officials who are, in part, responsible for the safety of their charges, we also recognize that security cannot justify the blanket deprivation of rights of the kind incurred here." *Jones*, 770 F.2d at 742. The Court recognizes that the JDC has a security interest in preventing the introduction of weapons or contraband into its facility. The evidence in this record, however, does not demonstrate that the incidence of smuggling weapons or contraband into the JDC is more than minimal. *See Giles*, 746 F.2d at 617 (the evidence before the Court showed that the incidence of smuggling activity at the jail was minimal).

Appendix C

The JDC's security interest must be balanced against the invasion of personal rights entailed in a strip search conducted pursuant to its written policies. The invasion of personal rights entailed in a strip search conducted pursuant to its written policies is similar to the invasion involved in the courts of appeals' decisions discussed above. As recognized by the Tenth Circuit Court of Appeals "[t]he experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state, in an enclosed room inside a jail, can only be seen as thoroughly degrading and frightening. Moreover, the imposition of such a search upon an individual detained for a lesser offense is quite likely to take that person by surprise, thereby exacerbating the terrifying quality of the event." *Chapman*, 989 F.2d at 396 (citations omitted). In this case, minors are required to completely disrobe in front of a same-sex JDC official and are visually inspected by a JDC official before they take a shower, in the absence of any suspicion that they are carrying or concealing a weapon or other contraband. As the Tenth Circuit held "[t]here can be no doubt that a strip search is an invasion of personal rights of the first magnitude." *Chapman*, 989 F.2d at 395. Interestingly, Defendants have not cited a case in which the security interest of a correctional facility has outweighed the personal rights of a person arrested for a minor offense, who was subjected to a strip search in the absence of any individualized suspicion that the arrestee was carrying or concealing a weapon or other contraband.

Similar to the *Giles* court, balancing the JDC's security interest against the privacy interests of the class members, the Court holds that minors charged with minor or non-felony

offenses may be subjected to a strip search only if JDC officials possess a reasonable suspicion that the individual minor is carrying or concealing a weapon or other contraband. *See Giles*, 746 F.2d at 617. Reasonable suspicion may be based on such factors as the nature of the offense, the minor's appearance and conduct, and the prior arrest record. *See id.*

The change to the strip search policy made in September 1999 did not cure the unconstitutionality of the policy. Rather, the two-hour grace period likely spared some minors from being strip searched in violation of the Fourth Amendment. The minors who were not picked up within two hours were subjected to the same unconstitutional search as those minors strip searched before the September 1999 policy change.

In addition to the two-hour grace period, Defendants emphasize that there was a screen installed in the shower to shield the minors' naked bodies from their necks down and their ankles up. The record is unclear whether this screen was installed only in the one shower in the unisex bathroom located in the non-secure area of the JDC, or whether there were screens also installed in the multiple showers in the girls' wing in the secure area of the JDC. In any event, a shower screen did not cure the unconstitutionality of the strip searches, because JDC staff visually searched all minors required to shower before entering the shower.

Now that the Court has held the JDC's written strip search policy is unconstitutional, the Court turns to the specific search of the Plaintiff in this action. Defendants seek to minimize the intrusion of the class members' personal rights by pointing out that Plaintiff was not required to shower

or remove her underwear and bra during the search of her body and clothing. Defendants state in their brief that "[j]uveniles were asked to remove only their outer clothing, not their undergarments, (Devlin Dep. at 13), a policy more lenient than recommended by national standards." (Defendants' Brief in Support of Motion for Summary Judgment, Doc. 87.) The record does demonstrate that some minors were not required to shower or remove their undergarments during their searches.

When asked whether minors were asked to remove their undergarments during the clothing search, one JDC official, Bridget Devlin, responded "I never—I don't recall asking anyone to do that. I mean, you can pretty much see what's there when they're in undergarments so—." (Devlin Dep. at 15.) Later in her deposition, Devlin does state that she did not require minors to remove their bras and underwear (Devlin Dep. at 31), and that if a minor was having issues with or was a little embarrassed by undressing in front of someone else she tried to afford them the right of dressing in the shower area. (Devlin Dep. at 39.) Jim Banbury, the Director of the JDC in 1999 testified, however, that during the time from when the expansion project was completed to the issuance of the revised written policies on September 14, 1999, JDC officers were inconsistently applying the JDC's written search policies that applied before the non-secure area was completed. (Banbury Dep. at 38-39, 53-54.) Some JDC officers were fully complying with the written strip search policy held unconstitutional above and others were modifying the searches to not require removal of undergarments. (*Id.*) Despite the inconsistencies in applying the written search policies to those minors not admitted to

the secure area of JDC, all of the class members required to take showers, whether housed in the secure or non-secure area, were visually searched while naked. And those minors subject to clothing searches, but were not required to shower, were required to at least remove all clothing except their undergarments and were subjected to a visual search of their bodies while wearing only their undergarments.

That the JDC official who searched Plaintiff did not require her to remove her underwear and bra in addition to her other clothing does not result in a different outcome from the holding above that the JDC's written strip search policy is unconstitutional. The Court described in detail above the written strip search policy in effect at the time Plaintiff was brought to the JDC on August 9, 1999, and the modifications to the policy on September 14, 1999, and the reasons it is unconstitutional. Although some JDC officials were not complying with the written procedure requiring all minors to completely disrobe and shower, the Court is unwilling to draw the line between constitutional and unconstitutional searches at whether the person being searched is completely nude or nearly nude. Defendants do not cite and the Court has not found a case drawing such a distinction. Rather, the Eleventh Circuit described a visual search of a female juvenile who was required to remove all of her outer clothing and her bra, but was allowed to keep her underwear on, as a "strip search," and did not draw a distinction between a search while wearing one's undergarments as less invasive than a search while completely nude. *See Justice v. City of Peachtree City*, 961 F.2d 188, 190-91 (11th Cir.1992).

Appendix C

The Eleventh Circuit Court of Appeals applied the Supreme Court's balancing test set forth in *Bell* to determine whether the strip search of the minor plaintiff violated her Fourth Amendment rights. *See id.* at 191-94. Despite the fact that the minor was allowed to keep her underwear on during the search, the Eleventh Circuit recognized that "[c]hildren are especially susceptible to possible traumas from strip searches.... [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Id.* at 192 (citations and quotation marks omitted). The strip search in *Justice* of a female juvenile required to remove all clothing except her underwear was found constitutional only because the Defendants had reasonable suspicion to believe the juvenile was carrying or concealing contraband. *See id.* at 194. In the present case Plaintiff's nearly naked body was visually searched for weapons and contraband, when she was arrested for a curfew violation, without any suspicion that Plaintiff was carrying or concealing such items.

Applying the balancing test to the search of the Plaintiff, the Court concludes that the search violated her Fourth Amendment rights. Plaintiff was arrested for a minor offense, a curfew violation. Like the offenses for which the plaintiffs in several courts of appeals regarding strip searches, a curfew violation is not normally associated with weapons, violence or drugs. *See, e.g., Chapman*, 989 F.2d at 395-97 (minor traffic violations); *Masters*, 872 F.2d at 1255 (minor traffic offense); *Giles*, 746 F.2d at 618 (recognizing that the plaintiff's traffic violation was related neither to drugs nor to weapons); *Jones*, 770 F.2d at 740-41 (leash law violation); *Logan*, 660 F.2d at 1013 (driving while intoxicated). JDC

officials had no suspicion that she was carrying or concealing a weapon or other contraband. There is no indication that Plaintiff had a prior delinquency record. There is evidence that Plaintiff was emotionally upset and crying while she was at the JDC, but there is no evidence that she was anything but cooperative and orderly. Weighing the intrusiveness of the strip search, even taking into account that Plaintiff was not required to remove her bra and underwear, against the minimal showing of need to conduct the indiscriminate search, the Court concludes that the search of Plaintiff on August 9, 1999, violated her Fourth Amendment rights.

Defendants contend that Defendant Banbury, former Director of the JDC, and Defendant Todd Cheever, current Director of the JDC, are entitled to qualified immunity from the Plaintiff's and the other class members' claims for monetary damages. Jail officials are "protected by qualified immunity so long as 'their actions could reasonably have been thought consistent with the rights they are alleged to have violated.' " *Gregoire v. Class*, 236 F.3d 413, 417 (8th Cir.2000) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). "To overcome this qualified immunity, the plaintiff must 'assert a violation of a constitutional or statutory right; that right must have been clearly established at the time of the violation; and, given the facts most favorable to the plaintiff, there must be no genuine issues of material fact as to whether a reasonable official would have known that the alleged action indeed violated that right.' " *Id.* (quoting *Liebe v. Norton*, 157 F.3d 574, 577 (8th Cir.1998)).

Appendix C

The lack of a Supreme Court ruling on the constitutionality of strip searching juveniles in a detention facility, does not preclude a finding that the law was clearly established that the search of the Plaintiff and the other class members violated their Fourth Amendment rights. The Eighth Circuit has recognized that in determining whether a right is clearly established for purpose of the qualified immunity defense:

> "[I]t is not necessary that the Supreme Court has directly addressed the issue, nor does the precise action or omission in question need to have been held unlawful. In the absence of binding precedent, a court should look to all available decisional law including decisions of state courts, other circuits and district courts. . . ."

Burnham v. Ianni, 119 F.3d 668, 677 (8th Cir.1997) (quoting *Hayes v. Long*, 72 F.3d 70, 73 (8th Cir.1995) (citation omitted)).

It is asserted in this action that Defendants Banbury and Cheever violated Plaintiff's and the other class members' Fourth Amendment right to be free from unreasonable searches. By the time of the violations involved in this action, it had been clearly established for several years that the Fourth Amendment protected persons from the kinds of searches of which Plaintiff and the class complain. *See Jones*, 770 F.2d at 742 n. 4 (denying qualified immunity to jail officials who conducted a strip search in 1981 on a person arrested for minor offenses without any suspicion that he was harboring weapons or contraband and holding that "the fourth

amendment's protection against the kind of search of which Jones complains was well-established at the time his search took place."). In addition to the Eighth Circuit, the Court cited above seven other federal courts of appeals that have ruled strip searching arrestees of minor offenses without at least reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband violates the arrestees' Fourth Amendment rights. Those courts applied the Supreme Court's balancing test set forth in *Bell*, 441 U.S. at 559, 99 S.Ct. 1861, in reaching their conclusions, as the Court has done in this case.

Defendants Banbury and Cheever argue that because their actions complied with national standards for good practice in the operation of juvenile correctional facilities, they are entitled to qualified immunity. It is noted that it has not been established on the record in this case that Defendants Banbury and Cheever were aware of the nationally recognized standards cited by Defendants' expert. In any event, even if they were aware of those standards, they are not entitled to the protection of qualified immunity because such standards do not override clearly established law. Based upon the established case law from the Eighth Circuit, as well as the seven other Circuit Courts of Appeals to have ruled on the unconstitutionality of strip searching persons arrested for minor offenses without any reasonable individualized suspicion of carrying or concealing contraband or weapons, the Court finds that there is no genuine issues of material fact as to whether a reasonable official would have known that the strip searches involved in this action indeed violated the class members' Fourth Amendment rights. Thus, Defendants Banbury and Cheever are not entitled to qualified immunity on Plaintiff's and the other class members' claims for monetary damages.

Appendix C

2. Religious Preference Questioning

Defendants seek summary judgment on the claims of the third and fourth classes certified by the Court regarding the JDC's policy and procedure in questioning minors being admitted to the JDC about their religious preferences. If a minor refused to answer the questions about their religious preferences, he or she was not forced to answer the questions and was not punished for refusing to answer. The minors that did answer the questions were not treated more or less favorably than any other detainees.

Defendants contend that the religious preference questions were asked to help JDC staff ensure that any required dietary restrictions or observances were met. Defendants argue that there was no infringement of the class members' rights to privacy or free exercise of religion as a result of the challenged questions.

In response to Defendants' motion, class counsel concedes "[s]ince the constitutional violation in this regard would result in only nominal damages and the defendants have discontinued the practice, plaintiffs are seeking only declaratory relief under Count II." (Plaintiffs' Response to Defendants' Motion for Summary Judgment, Doc. 104.) As a result of this abandonment of a claim for monetary damages, Defendants are entitled to summary judgment on all claims asserted by the fourth class certifred by the Court seeking monetary damages for the Defendants' practice of questioning minors about their religious beliefs.

Appendix C

In light of the Defendants' discontinuance of questioning minors about their religious beliefs and the abandonment of any claim for damages on that claim, the Court must examine whether a live case or controversy continues to exist. "Article III of the Constitution only allows federal courts to adjudicate actual, ongoing cases or controversies." *Potter v. Norwest Mortgage, Inc.*, 329 F.3d 608, 611 (8th Cir.2003). "When an action no longer satisfies the case or controversy requirement, the action is moot and a federal court must dismiss the action." *Id.* (citing *Minn. Humane Soc'y v. Clark*, 184 F.3d 795, 797 (8th Cir.1999)). The Supreme Court explained:

> It has long been settled that a federal court has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.". . . . For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant "any effectual relief whatever" to a prevailing party, the appeal must be dismissed.

Church of Scientology of California v. United States, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (citations omitted). In this case, the Defendants discontinued the practice of asking minors admitted to the JDC about their religious beliefs. There is no evidence in the record to suggest that the Defendants intend to reestablish this practice. Even if the Court were to find the practice violated Plaintiff's and the other class members' constitutional rights, the withdrawal of the claim for monetary damages makes it impossible for the Court to grant "any effectual relief whatever" to the class.

Id. Declaratory relief on the religious questioning practice as requested by Plaintiff "cannot affect the matter in issue in the case" before the Court. Thus, the Court finds the claims of the third class certified by the Court must be dismissed without prejudice as moot.

CONCLUSION

The Court will deny Plaintiff's Motion to Strike, Doc. 101, but the Court rejects that portion of Dr. Kehoe's report where he opines that the JDC's policies and practices are "neither unconstitutional nor unlawful." It is for the Court to determine whether the JDC's policies and practices are unconstitutional or unlawful. For the reasons set forth above, the Court concludes that the JDC's blanket policy of strip searching minors arrested for minor or non-felony offenses, without any individualized determination of reasonable suspicion that the individual was or is likely to be carrying or concealing weapons, drugs or other contraband, violates the Fourth Amendment. Furthermore, the strip search of the Plaintiff, Jodie Smook, violated her Fourth Amendment rights. The members of the first two classes certified by the Court, therefore, are entitled to summary judgment on their claims that the strip searches they endured at the JDC pursuant to the JDC's blanket strip search policy violated their Fourth Amendment rights to be free from unreasonable searches. The remaining issues relating to the strip search claims are: 1) what type of injunctive relief is appropriate in this case; 2) what amount of monetary damages are appropriate and how should the class members' damages be determined; 3) what should the ending date be for membership in the first two classes certified by the Court.

Appendix C

The claims asserted by the third class certified by the Court, the class seeking injunctive relief for being questioned about their religious beliefs, will be dismissed without prejudice as moot. Summary judgment will be entered in favor of the Defendants, and against the fourth class certified by the Court, because the class has abandoned the damages claim for being subjected to questioning about their religious beliefs at the JDC. Accordingly,

IT IS ORDERED:

1. That Plaintiff's Motion to Strike Expert Report, Doc. 101, is denied.

2. That Plaintiff's Motion for Partial Summary Judgment, Doc. 91, is granted.

3. That Defendants' Motion for Summary Judgment, Doc. 86, is (a) granted to the extent that the claims by the third class, seeking injunctive relief based on religious questioning, are dismissed without prejudice as moot; (b) granted as to the claims by the fourth class, seeking damages based on religious questioning; and (c) denied as to the strip search claims asserted by the first and second classes.

4. That at the close of the case, judgment will be entered in favor of Defendants on the claims of the following classes:

All persons seeking injunctive relief in this action who, when they under the age of eighteen years, were charged with minor offenses from November 1, 1997 to September 14, 1999, or were charged with non-felony offenses from April

16, 1999 to September 14, 1999, and were, pursuant to JDC policy, subjected to questioning about their religious beliefs at the Minnehaha County Juvenile Detention Center.

All persons seeking compensatory and punitive damages in this action who, when they under the age of eighteen years, were charged with minor offenses from November 1, 1997 to September 14, 1999 or were charged with non-felony offenses from April 16, 1999 to September 14, 1999, and were, pursuant to JDC policy, subjected to questioning about their religious beliefs at the Minnehaha County Juvenile Detention Center.

5. That, on or before October 11, 2004, Plaintiff shall file and serve a proposed plan to conclude the monetary damages and injunctive relief issues remaining on the strip search claims as well as propose an ending date for membership in the first two classes certified by the Court. On or before November 1, 2004, Defendants shall file and serve a response to Plaintiff's plan, and if they do not agree with Plaintiff's plan they shall include a proposed plan. Plaintiff shall file and serve a reply to Defendants' response, on or before November 11, 2004.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC DATED SEPTEMBER 28, 2006

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-1363

Jodie Smook, etc.,

Appellee,

vs.

Minnehaha County, South Dakota, et al.,

Appellants.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye would grant the petition for rehearing en banc.

Judge Wollman did not participate in the consideration or decision of this matter.

(5128-010199)

September 27, 2006

(2)

No. 06-1034

FILED
FEB 2 3 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JODIE SMOOK, Individually and on behalf of all other persons similarly situated,

Petitioners,

v.

MINNEHAHA COUNTY, SOUTH DAKOTA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Fourth Amendment prohibit a policy that in all instances requires a strip search of all juveniles brought to a juvenile detention facility without regard to individualized considerations, such as the individual's circumstances, the alleged offense, or whether individualized suspicion exists to believe that the juvenile is carrying or concealing weapons or contraband?

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STATEMENT OF THE CASE

Factual Background

There is no genuine dispute in this case about the facts surrounding Petitioner's search or the policy in place at the time of that search. Further, it is undisputed that the Minnehaha County Juvenile Detention Center ("JDC") changed its policy in 1999 to allow a two-hour grace period during which any juvenile arrested for minor offenses could be held pending contact with that juvenile's parent without being admitted and searched. Pet. App. 3. After South Dakota passed legislation in 2000 barring visual searches for juveniles detailed solely for curfew violations, the JDC again adjusted its policies to comply with the new law. Pet. App. 4 n. 4 (citing SDCL § 26-11-1.1 (2006)). Thus, it is undisputed that the type of search conducted upon Petitioner is no longer taking place.

Opinions Below

The district court held that Petitioner's search violated her Fourth Amendment right to be free from unreasonable search and seizure. Pet. App. 40a-68a. It further held that juveniles charged with non-felony offenses could only be subjected to visual searches if JDC officials had reasonable suspicion of concealed weapons or contraband. *Id.* Shortly after the district court's decision, Minnehaha County brought a motion for reconsideration in light of *N.G. v. Connecticut*, 382 F.3d 225 (2nd Cir. 2004), a case decided in the interim between the briefing of the case and the district court's decision. The district court granted Minnehaha County's request to reconsider its ruling. Pet. App. 21a-39a. Upon reconsideration, the district court

again held that Minnehaha County's search policy and the search of Petitioner specifically were unconstitutional. *Id.*

In August 2006, the Court of Appeals for the Eighth Circuit reversed the district court's decision and remanded the case back to the district court. Pet. App. 1a-20a. The court of appeals held, *inter alia*, that Petitioner's search was constitutional and that the class lacked standing to seek injunctive relief due to the JDC's change in policies. *Id.* The court of appeals declined to rule on the facial challenge to the JDC's policy and remanded the case to the district court for further determination on a case-by-case basis if a suitable replacement class representative could be located. *Id.* at 17a.

REASONS FOR DENYING THE WRIT

As Petitioner concedes in her petition for writ of certiorari, the JDC has adjusted its policy to discontinue the conduct of which Petitioner complains. Pet. App. 3-4. As such, any purported constitutional violations by Minnehaha County are no longer taking place, and Petitioner's argument that the JDC policy is unconstitutional is moot. Under Article III of the Constitution, Petitioner's attempt to seek the Court's determination as to the constitutionality of a now defunct policy does not meet the jurisdictional requirements of a live controversy.

Further, the decision of the court of appeals is interlocutory in nature. It simply reversed the district court's erroneous decision granting summary judgment in favor of the plaintiff class, held that the lead plaintiff's constitutional rights had not been violated, and remanded the case to the district court for further proceedings with respect to

the remaining class members. Pet. App. 1a-20a. Upon the dismissal of the lead plaintiff's case, the plaintiff class now has the opportunity to locate a suitable replacement class lead. Pet. App. 17a. In the event a new class representative is located, the potential for an actual trial and an ensuing record for review would exist. *Id.* As the record now exists, it is insufficient to determine whether other class members' constitutional rights have been violated.

Moreover, the decision of the court of appeals on the merits of the lead plaintiff's claim is correct and does not conflict with any decision of this Court or any other court of appeals. In fact, the Eighth Circuit decision is only the second decision nationwide to determine the constitutionality of visual searches of juveniles being admitted to secure detention facilities. Pet. App. 8a-9a; see also *N.G. v. Connecticut*, 382 F.3d 225 (2nd Cir. 2004). The prior court to make such a determination, the Court of Appeals for the Second Circuit, decided a very similar case in the same manner as the court of appeals did in this case. *N.G. v. Connecticut*, 382 F.3d 225 (2nd Cir. 2004) (holding that visual searches of juveniles upon admission to secure detention facilities did not violate the Fourth Amendment). In the instant case, the Court of Appeals for the Eighth Circuit agreed with the rationale of the Second Circuit. Pet. App. 9a-20a. By following the Second Circuit, the Eighth Circuit decision created unity between the circuits, not a split in the circuits. In fact, the Eighth Circuit decision built upon the foundation laid by the only other court to have considered this very issue. Thus, there is no split in the circuits, the Eighth Circuit decision is correct under the law, and further review at this time is unwarranted.

1. Petitioner's argument is moot because the JDC policies being complained of are no longer in effect or being enforced.

The question presented by Petitioner is whether the Fourth Amendment prohibits a policy that in all instances requires a strip search of all juveniles brought to a juvenile detention facility without regard to individualized considerations, such as the individual's circumstances, the alleged offense, or whether individualized suspicion exists to believe that the juvenile is carrying or concealing weapons or contraband. Pet. App. *i*. Petitioner hopes to appeal a very broad constitutional issue "of national importance." Pet. App. 10.

However, it is undisputed that Minnehaha County's policy on this issue has changed dramatically since the date of Petitioner's search. Pet. App. 3-5. The JDC is no longer performing visual searches of minors accused of curfew violations unless the JDC official has reasonable suspicion that the juvenile is harboring weapons or contraband. Pet. App. 4 n. 4. Thus, the very type of search of which Petitioner complains is no longer being conducted, making the question presented by Petitioner moot.

Under Article III § 2 of the Constitution, the federal courts lack jurisdiction to entertain cases that no longer present live controversies. See, e.g., *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *St. Pierre v. United States*, 319 U.S. 41, 42 (1943) (per curiam).

> This means that, throughout the litigation, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Spencer*, 523 U.S. at 7 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477

> (1990)). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate ... The parties must continue to have a 'personal stake in the outcome' of the lawsuit." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478, 110 S.Ct. 1249, 1254, 108 L.Ed.2d 400 (1990). See also *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334-35, 45 L.Ed.2d 272 (1975). This means that, throughout the litigation, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis*, supra, at 477, 110 S.Ct., at 1253.

Spencer, 523 U.S. at 7.

Because the JDC is no longer conducting the type of searches of which Petitioner complains, a favorable decision will not necessarily change the JDC's current policy and will not redress Petitioner's perceived wrongs. Accordingly, the Article III requirement is no longer satisfied in this case, and the petition should be denied.

2. The interlocutory nature of the Eighth Circuit decision makes plenary review premature.

Petitioner brought her claim as the lead plaintiff in a class action. Pet. App. 4. The court of appeals held that Petitioner's claim has no merit. Pet. App. 12a. However, the court of appeals left the door open to other class members whose claims will now be allowed to continue, provided that a suitable class representative is located. Pet. App. 16a. Further proceedings before the district court may make it unnecessary for the Court to address any number of the questions currently presented in this case. If the district court determines that another class

member's constitutional rights have been violated, the Court can avoid Petitioner's question altogether.

Because of the interlocutory nature of this case, review of Petitioner's claims at this juncture would be premature. See *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 21, 258 (1916) (interlocutory nature of a case is sufficient reason to deny application for writ of certiorari); see also *Virginia Military Inst. v. United States*, 508 U.S. 946 (1992) (opinion of Scalia, J., denying certiorari prior to final judgment). Any review of constitutionality by the Court would necessarily take place in a vacuum due to the undeveloped nature of the record, making informed resolution nearly impossible. See *Kremens v. Bartley*, 431 U.S. 119, 134 (1977) (declining to make a determination of constitutionality of unnamed class members' claims in a class action due to the "unfocused" nature of those claims).

The interlocutory character of the case "itself alone furnishe[s] sufficient ground for the denial" of Petitioner's request for this Court's review. *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of petition for certiorari) ("[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); Robert L. Stern *et al.*, *Supreme Court Practice* § 4.18, at 258-261 (8th ed. 2002).

Regardless of whether the case is moot or whether the circuit court's decision is correct, the procedural posture of this case alone is sufficient to warrant denial of review by the Court. Indeed, such review would be premature if

granted at this juncture. Because the court of appeals remanded the case back to the district court for further proceedings, there is no need for review of the constitutional question now. The lack of a developed record on important factual issues is reason enough to deny the petition at this stage of the proceedings. Only after the district court has made a further determination on the other class members' claims would appellate review be appropriate if warranted.

3. Petitioner contends that the Eighth Circuit decision creates a conflict with decisions of other circuits. The Eighth Circuit decision is correct, and none of the purported conflicts withstands scrutiny.

The court of appeals correctly concluded that Petitioner's constitutional rights had not been violated, and its decision does not conflict with any decision by this Court or any other court. In fact, the Eighth Circuit decision comports with the only other federal case law to squarely address the issue of suspicionless searches of juveniles upon intake to a secure detention facility, *N.G. v. Connecticut*, 382 F.3d 225 (2nd Cir. 2004).

Petitioner argues that the circuit court's decision "is at odds with the ten circuit court opinions to consider a policy of strip searching adults arrested for minor offenses and a circuit court opinion considering such a policy as applied to minors." Pet. App. 9-11. However, Petitioner ignores the fact that the court of appeals clearly differentiated the adult search cases from those involving juveniles in reaching its decision. Pet. App. 8a.

Following the Second Circuit in *N.G. v. Connecticut*, the Eighth Circuit decision allows visual searches of

juveniles being admitted to detention centers in the absence of reasonable individualized suspicion. Pet. App. 10a (citing *N.G. v. Connecticut*, 382 F.3d 225 (2nd Cir. 2004)). The court of appeals initially surveyed the law regarding strip searches of adult detainees and recognized that it, along with other circuits, did not permit strip searches of *adults* confined for minor offenses. Pet. App. 8a-9a. The court of appeals, however, then went on to adopt a very different rule in the context of *juvenile* detainees and held that such searches are constitutionally permissible. *Id.* at 10a.

At the core of the circuit court's decision is a recognition of the state's obligation to protect minors housed in its juvenile detention facilities. *Id.* at 8a-10a. This rationale is what differentiates the Eighth Circuit decision from the adult search cases cited by Petitioner. The circuit court held that protecting juveniles from harming themselves or others and protecting the overall safety of the institution are valid purposes to conduct searches at admission, purposes which must be weighed when considering the reasonableness of such searches. Pet. App. 10a.

Petitioner argues that the age of the juveniles being admitted to the JDC renders them especially vulnerable to the distressing effects of a strip search. Pet. App. 16-17. However, age is the very reason that the Eighth Circuit decision stands apart from the circuit court cases dealing with adults. The age of the juveniles being admitted to the JDC creates an enhanced responsibility to take reasonable action to protect them from hazards resulting from the presence of contraband where they are confined. Pet. App. 10a.

Because the JDC temporarily becomes the *de facto* guardian of minors lawfully removed from their homes,

the government effectively acts as a guardian. *Id.* It is this unique role that begs the question of whether the search is one that a reasonable guardian would potentially make. *Id.* 12a-13a. Acting *in loco parentis*, the JDC has a pervasive responsibility for its charges. *Id.* at 8a. In addition, visual searches upon admission to the JDC protect admittees by locating and removing concealed items that could be used for self-mutilation, suicide or attacks on other juveniles. *Id.* Finally, visual searches have the potential to disclose evidence of child abuse which may then be addressed and treated appropriately. *Id.*

Petitioner cites *Justice v. City of Peachtree* for the proposition that the state's interest in searching for potential contraband on juveniles is no different that its interest in searching adults for the same reason. Pet. App. 21 (citing *Justice v. City of Peachtree*, 961 F.2d 188, 193 (11th Cir. 1992)). However, Petitioner ignores the fact that the *Justice* court made only a determination as to the constitutionality of searches conducted upon juveniles based on *reasonable suspicion* that those juveniles were harboring weapons or contraband. *Justice*, 961 F.2d at 193. That court held that such searches were reasonable, and it did not reach the issue of suspicionless searches of juveniles upon admission to secure detention facilities. *Id.* Thus, Petitioner's contention that the court of appeals decision somehow conflicts with the *Justice* decision does not hold up. Certainly a determination of the constitutionality of one type of search does not automatically invalidate a different type of search, one which the *Justice* court did not even consider.

Petitioner's argument that the Eighth Circuit decision created a split in the circuits does not withstand closer scrutiny. It is the unique relationship between the state

and the juveniles being admitted to secure detention facilities that sets the Eighth Circuit decision apart from the adult search cases cited by Petitioner. *Id.* 8a-9a. Furthermore, Petitioner's cited juvenile search case held that juvenile searches based upon reasonable suspicion are acceptable, but that case does not speak to Petitioner's issue and is neither controlling nor in conflict with the Eighth Circuit decision. See *Justice v. City of Peachtree*, 961 F.2d 188, 193 (11th Cir. 1992). Thus, the Eighth Circuit decision does not create a rift in the circuits, nor does it undermine established adult or juvenile search law in any way. To the contrary, the Eighth Circuit decision simply provides additional guidance in the area of juvenile searches upon admission to secure facilities and builds upon prior case law in the Second Circuit. Accordingly, the Court should deny Petitioner's request for a writ of certiorari as no split exists in the circuits, and the Eighth Circuit's analysis is correct.

CONCLUSION

It is undisputed that the JDC has changed its policy to bar the type of search to which Petitioner was submitted. Thus, regardless of the constitutionality of Petitioner's own search, the question presented by Petitioner – the propriety of the JDC's policy – is now moot. Because the purportedly unconstitutional policy is no longer in place, there is no live controversy for the Court to entertain, and the Article III requirement has not been met.

Even if the question presented to the Court were not moot, this case is not an appropriate vehicle to resolve

Petitioner's question. The case was disposed of at the summary judgment stage, leaving little in the way of a record for the Court to review. Furthermore, the court of appeals remanded the case to the district court for further proceedings as to the remaining class members' claims, making review at this time unnecessary. Accordingly, to decide the issue presented at this juncture without the benefit of a complete and concrete record would be premature.

Finally, the Eighth Circuit decision does not create a split in the circuits. Instead, the court of appeals followed the logic and reasoning employed by the Second Circuit in *N.G. v. Connecticut*, which is the only reported case in any court to have considered the propriety of visual searches of juveniles being admitted to secure detention facilities. See 382 F.3d 225 (2nd Cir. 2004). All of Petitioner's purported conflicts deal with searches of adults which are, admittedly, performed in a different context with different constitutional concerns, none of which conflict with the Eighth Circuit rationale. As such, the Eighth Circuit decision does not create a conflict with this Court, any court of appeals, or any lower court. Instead, the court of appeals correctly decided the constitutional issue as it applies to juveniles, building upon prior case law in another circuit.

In conclusion, this case is not a proper vehicle for review by the Court because the question presented is moot, the interlocutory nature of the case makes review at this time premature, there is no conflict in the circuits, and the court of appeals correctly decided the case. Accordingly, Minnehaha County respectfully requests that the

Court deny Petitioner's request for a writ of certiorari and decline to hear this case.

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No. 06-1034

IN THE

Supreme Court of the United States

JODIE SMOOK, Individually and on behalf of all other persons similarly situated,

Petitioners,

v.

MINNEHAHA COUNTY, SOUTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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REASONS FOR GRANTING THE PETITION

Minnehaha County's three arguments against certiorari each lacks merit. First, the changes to the strip search policy of the Minnehaha County Juvenile Detention Center ("JDC") do not render this case moot because petitioners are litigating live damages claims for unconstitutional searches conducted under the old policy as well as those that persist even under the revised policy. Second, the interlocutory nature of this appeal is no bar to certiorari, and the fact that the Eighth Circuit's decision below effectively resolved the critical legal issue on petitioners' facial challenge strongly counsels in favor of granting review. Third, a well-developed 10-2 circuit split exists on the central issue presented in this petition: whether juveniles in pretrial detention may be constitutionally strip searched absent any individualized consideration (two cases) even though adults under similar circumstances may not be (ten cases).[1]

I. This Damages Action on Behalf of the Petitioner Class Has Not Been Mooted by Modifications to the Strip Search Policy.

Minnehaha County mistakenly asserts that petitioners' claims are moot because "the JDC has adjusted its policy to discontinue the conduct of which Petitioner complains." Br. Opp'n 2. This assertion is absolutely false, and Minnehaha County's mootness argument is a red herring.[2]

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[1] In addition to conflicting with the ten circuit court opinions to consider a policy of strip searching adults arrested for minor offenses, the Eighth Circuit opinion is also at odds with a circuit court opinion considering such a policy as applied to juveniles. *See Justice v. City of Peachtree*, 961 F.2d 188 (11th Cir. 1992).

[2] Minnehaha County did not raise this mootness argument either at summary judgment or in front of the Eighth Circuit.

After named-plaintiff Jodie Smook's unconstitutional search in August 1999, the JDC twice changed its strip search policy. In September 1999, it provided that a limited category of juveniles charged with "minor offenses" would be subject to a two-hour grace period before a strip search would be conducted. *See* Pet. Cert. 3-4. Following the passage of a South Dakota statute in February 2000, it further amended its policy to provide that no juveniles charged with a curfew violation would be strip searched without probable cause. *See id.* at 4 n.4. *See also* Pet. App. 4a-5a; 42a-44a (describing policy changes). Both modifications occurred well before the Complaint in this matter was filed in November 2000.

Contrary to language in Minnehaha County's brief, *see* Br. Opp'n 4-5, the JDC policy still, to the present day, provides for strip searches without reasonable suspicion for every juvenile charged with minor or non-felony offenses except for those charged with curfew violations.[3] Minnehaha County completely ignores the fact that petitioners represent a class of juveniles who have been strip searched pursuant to JDC policies. Petitioners are litigating live claims that relate not only to unconstitutional searches conducted under the JDC's old policy, but also unconstitutional searches that persist under the JDC's revised policy. Petitioners have legally cognizable interests in the outcome of these live claims, regardless of the revised policy,

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[3] The JDC's universal strip search policy applies to juveniles charged with a wide range of offenses, including offenses such as truancy, failure to appear, and tobacco use. There are 18 different offenses that qualify as "non-felony" offenses, as to which no waiting period applies before juveniles are strip searched. Pet. Cert. 5 n.5. There are three offenses (in addition to curfew violations) that qualify as "minor" offenses. The JDC's two-hour wait policy applies only to such minor offenses; after the expiration of that period, these alleged offenders are also strip searched. *Id.* at 3-4.

and thus mootness is inapplicable. *See Northeastern Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 661-62 (1993) (when new ordinance disadvantaged petitioners in the same fundamental way, gravamen of complaint undisturbed and case not moot).

Even more importantly, petitioners are only seeking damages relief in this action. As petitioners explained in their petition, certiorari is not sought as to the Eighth Circuit's holding that the class lacks standing to seek injunctive relief. *See* Pet. Cert. 7 n.7. Because the relief sought is limited to damages for incurred or prospective constitutional violations, this case cannot be mooted by a change in the JDC's policy. "[S]o long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 608-09 (2001). The claims for damages brought by Smook and the other members of the petitioner class cannot be mooted by the JDC's actions, and are not mooted by the loss of injunctive relief. *See Powell v. McCormack*, 395 U.S. 486, 495-500 (1969) (where petitioner's claim for injunctive relief challenging his exclusion from Congress was mooted by his reelection, claim for damages remained a live controversy); *cf. Kremens v. Bartley,* 431 U.S. 119, 129 (1977) (claims were mooted by legislative action when class sought only injunctive relief).

II. Certiorari Should Be Accepted At This Stage To Resolve An Important Constitutional Issue Of National Importance And To Provide Critical Guidance On Remand; the Court Should Grant Certiorari Despite the Interlocutory Nature of the Appeal.

This Court indisputably has jurisdiction to review interlocutory decisions of federal courts of appeals; it is not a requirement of certiorari that the underlying decision be final

or that a final judgment exist. *See* 28 U.S.C. § 1254. The Court should exercise its discretion to grant certiorari in this case, despite the technically interlocutory nature of the appeal, because the Eighth Circuit effectively decided the fundamental constitutional question raised in petitioners' facial challenge and no further disposition by the district court will aid in, or obviate the need for, this Court's ultimate resolution of that issue. This Court has, on many occasions, taken cases in an identical procedural posture as this one,[4] or with even less of a record.[5]

The Eighth Circuit's ruling that the Fourth Amendment does not prohibit the JDC's universal policy under which Smook was strip searched resolved the critical legal issue in this case. Consequently, the "resolution of this basic issue should be made at this stage of the litigation and not postponed until [further proceedings] under the Court of Appeals' decision." *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 381 (1970) (granting certiorari after court of appeals reversed and remanded district court's summary judgment ruling for plaintiffs). This is especially so because determination of this important issue is "fundamental to the further conduct of the case" on remand. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) (internal quotation and citation omitted).[6]

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[4] *See Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 168-70 (1994) (granting certiorari when court of appeals reversed and remanded district court's granting of summary judgment); *accord Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 191-93 (1976); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

[5] The district court proceeding here was decided on summary judgment. *Compare Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1304 (2006) (preliminary injunction); *Estelle v. Gamble*, 429 U.S. 97, 99 (1976) (motion to dismiss); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (same).

[6] The Eighth Circuit declined to decide the constitutional question with respect to petitioner class members who were stripped completely

(Cont'd)

Moreover, this case presents a facial challenge to the JDC's written strip search policy, so further development of the record would not aid this Court's review. Petitioners and respondent agree that the question before this Court is whether the Fourth Amendment prohibits a policy that "in all instances" requires juveniles to be strip searched. Pet. Cert. i; Br. Opp'n i. There is no dispute that the policy demands such searches, without *any* individualized consideration, for all offenses except (since February 2000) curfew violations. Nor is there any other dispute regarding any material fact; the parties cross moved for summary judgment in front of the district court.

Minnehaha County claims that further district court proceedings could make it unnecessary for the Court to "address any number of the questions currently presented in this case," Br. Opp'n 5, though it fails to identify even one such possibility. To the contrary, further proceedings below will not obviate this Court's role in determining questions raised by class members, like Smook, who were or will be stripped nearly naked and who no longer have valid claims under the Eighth Circuit's reasoning. These class members will have the same legal challenge to the policy as exists today.[7]

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naked, *see* Pet. App. 15a-17a, however, its *in loco parentis* analysis is dangerously broad and potentially equally applicable to the remaining petitioners in this case.

[7] The cases Minnehaha County cites in its interlocutory appeal argument are distinguishable. *See* Br. Opp'n 6. In some of them, the district court—unlike in this case—had not determined matters critical to the disposition of the case. *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (district court had not yet proposed one of the potential remedial plans court of appeals had suggested); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967) (in case involving contempt order, appellate court had remanded for determination of whether and to what extent

(Cont'd)

III. An Important Circuit Split Exists and Warrants Resolution by This Court.

Minnehaha County misapprehends petitioners' argument when it asserts that "Petitioner ignores . . . that the court of appeals clearly differentiated the adult search cases from those involving juveniles in reaching its decision." Br. Opp'n 7. Quite the contrary: petitioners' acknowledgment of this analysis forms the very basis of their certiorari petition because petitioners seek this Court's review of whether such a distinction is warranted under Fourth Amendment jurisprudence. For all the reasons explained in petitioners' certiorari petition, it is not.

Notably absent from Minnehaha County's opposition brief is any direct rebuttal to the fulsome explanation the certiorari petition provides for why the Eight Circuit's ruling below, and the Second Circuit's preceding decision in *N.G. v. Connecticut,* 382 F.3d 225 (2d Cir. 2004), cannot be reconciled with this Court's Fourth Amendment cases. In applying a Fourth Amendment balancing test, this Court has repeatedly eschewed bright line rules, required a meaningful consideration of less intrusive but equally effective search alternatives, and demanded a governmental record demonstrating the necessity of intrusive and traumatic searches. *See* Pet. Cert. 9-24. Minnehaha County's opposition brief is silent on these matters because it cannot contest them.

Instead, Minnehaha County attempts to avoid certiorari merely by engaging in an invalid tautology: it seeks to defend the ruling below by presuming that it is correct. Specifically,

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contemptuous behavior had actually occurred). In another case, the district court had not resolved a damages issue, and unlike here, the certiorari petition did not raise any question of public interest or general importance, and no conflict existed between federal circuits. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

respondent relies wholly upon the distinction between adults and juveniles, repeating the illegitimate mantra that the County's *in loco parentis* responsibility towards juveniles allows it to strip search them under circumstances in which it could not strip search adults.[8] Br. Opp'n 7-9. But the validity of this distinction is precisely the issue in dispute, and thus the properly formulated circuit split is the 10-2 split (adults v. juveniles) described in the certiorari petition. *See* Pet. Cert. 10-12.

Finally, Minnehaha County fails in its attempt to discredit petitioners' reliance upon the Eleventh Circuit's decision in *Justice v. City of Peachtree,* 961 F.2d 188 (11th Cir. 1992). Petitioners cite *Justice* for the proposition that the state's interest in searching for contraband is the same regardless of whether the detainee is a juvenile or adult. *See* Pet. Cert. 21. Minnehaha County misses this point when it criticizes petitioners for "ignor[ing]" that *Justice* found constitutional a juvenile strip search conducted under reasonable suspicion. Br. Opp'n 9. First, Minnehaha County takes an unjustifiably cramped view of the Eleventh Circuit's reasoning in *Justice. See* 961 F.2d at 191-94. Calling its result "troubl[ing]," and despite the fact that "the strip search of a juvenile based on less than probable cause 'instinctively gives us the most pause,'" the Eleventh Circuit held that law enforcement may strip search a juvenile "based on reasonable suspicion to believe that a juvenile is concealing weapons or contraband." *Id.* at 193 (citing *Bell v. Wolfish,* 441 U.S. 520, 558 (1979)). The Eleventh Circuit's serious concern with upholding a strip search policy that required a reasonable suspicion determination strongly suggests that a policy that required *no* individualized considerations would be found, under its analysis, unconstitutional. *See id.* at 191-94. Second, the *Justice* ruling is based in part on its finding that the state interest

[8] The invalidity of this distinction is explained both in the certiorari petition and in an amicus brief supporting it. *See* Pet. Cert. 14-15, 18-19; Amicus Curiae Brief Of Juvenile Law Center In Support of Petition for a Writ of Certiorari 13-18.

in detecting contraband is *the same* for juvenile and adult detainees, *ibid*, which is in conflict with the Eighth Circuit's reasoning that Minnehaha County has *enhanced* responsibilities for detecting contraband when juveniles are involved. *See* Pet. Cert. 21.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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No. 06-1034

In the

Supreme Court of the United States

JODIE SMOOK, Individually, and on behalf of all other persons similarly situated,

Petitioners,

v.

MINNEHAHA COUNTY, SOUTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF JUVENILE LAW CENTER FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF JUVENILE LAW CENTER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF JUVENILE LAW CENTER FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORIARI

Juvenile Law Center respectfully moves this Court, on behalf of twenty-three organizations, pursuant to Supreme Court Rule 37(2)(b), for leave to file an *amicus curiae* brief in support of Petitioners. In support, Juvenile Law Center states as follows:

1. Juvenile Law Center (JLC), the oldest multi-issue, public interest law firm for children in the United States, was founded in 1975 to advance the rights and well-being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies: for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. More detailed information about JLC is available at www.jlc.org.

2. JLC works to integrate juvenile justice practice and policy with knowledge of adolescent development. JLC has authored several publications on this topic, including *Kids are Different: How Knowledge of Adolescent Development Theory Can Aid Decision-Making in Court*, a module in *Understanding Adolescents: A Juvenile Court Training Curriculum* (ed. by Lourdes Rosado, American Bar Association Juvenile Justice Center, Juvenile Law Center, Youth Law Center 2000). JLC's executive director, Robert G. Schwartz, co-edited *Youth on Trial: A Developmental Perspective on Juvenile Justice*, an examination of the impact of the legal system on adolescent development and psychology published in 2000 (ed. by Thomas Grisso and Robert G. Schwartz,

University of Chicago Press). JLC has also used knowledge of adolescent development to inform its contributions in two recent *amicus* briefs to this Court: *Roper v. Simmons*, 543 U.S. 551 (2005) (regarding the constitutionality of the death penalty for minors aged sixteen and seventeen at the time of their crimes) and *Yarborough v. Alvarado*, 124 S.Ct. 1706 (2004) (regarding whether a minor's age was properly considered when determining if the minor was in custody during a police interrogation).

3. JLC is particularly concerned with juvenile and criminal justice systems and their effect on children's emotional and psychological health. JLC is an active participant in the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, addressing the effects of juvenile and adult incarceration on juvenile offenders.

4. JLC helps to facilitate a national dialogue on juvenile justice issues both by participating as *amici* in cases across the country and conducting trainings at national conferences hosted by organizations such as the American Bar Association, National Council of Juvenile and Family Court Judges, Office of Juvenile Justice and Delinquency Prevention, and the National Association of Council for Children. JLC is also a co-founder, with the American Bar Association and the Youth Law Center, of the National Juvenile Defender Center (NJDC). NJDC offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

5. All of the aforementioned projects are the result of JLC's collaborations with medical and mental health professionals, national and local policymakers, social scientists, and advocacy agencies that work on behalf

of children. For example, *Youth on Trial: A Developmental Perspective on Juvenile Justice*, was co-edited by JLC's executive director and Thomas Grisso, director of forensic training and research in the department of psychiatry of the University of Massachusetts Medical School.

6. This case involves the constitutionality under the Fourth Amendment of the policy of the Minnehaha, South Dakota, County Juvenile Detention Center (JDC) to strip-search juveniles without probable cause or individualized suspicion upon entry to the facility. The application of the Fourth Amendment to strip searches of juveniles charged with minor offenses is a matter of first impression in the Supreme Court.

7. The Eighth Circuit's decision conflicts with its own precedent and the decisions of virtually every other circuit that strip-searches of adults for minor offenses are unconstitutional in violation of the Fourth Amendment protection against unreasonable searches..

8. The questions of law before this Court are closely tied to important and pressing public policy concerns related to appropriate care for children in the juvenile justice system. The Eighth Circuit's decision rests largely on the Court's holding that the detention center's duty to act *in loco parentis* necessitates the performance of searches on juveniles that would be unconstitutional if performed on adults. This conclusion raises vital concerns about the psychological effect of strip searches on adolescents, and the particular impact of such searches on children who have been the victims of sexual abuse and violence. As an organization that works closely with policy-makers, juvenile justice advocates, social scientists and medical and mental health professionals, JLC is positioned to offer unique insight to the Court regarding this issue.

9. Juliet Berger-White, Esq. of Hughes Socol Piers Resnick & Dym, Ltd., attorney for Petitioners, has consented on behalf of the Petitioners to Juvenile Law Center's request to file an *amicus curiae* brief in this matter.

10. Juvenile Law Center respectfully requests that this Court allow it to appear as *amici* in support of the petitioners, Jodie Smook and all other persons similarly situated, on the issue of the application of the Fourth Amendment to strip searches performed on juveniles charged with minor offenses in the absence of individualized suspicion.

WHEREFORE, Juvenile Law Center respectfully requests that this Honorable Court enter an order granting it leave to file an *amicus curiae* brief in support of the petition for a writ of certiorari.

Respectfully submitted,

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DATED: February 27, 2007

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INTEREST OF THE *AMICI*

Amici Juvenile Law Center, *et al.*[1] represent twenty-three organizations and individuals throughout the country who work on issues of child welfare, juvenile justice and children's rights generally. *Amici* have a unique perspective on minors who come into contact with the juvenile justice system either because of allegations of delinquent behavior or non-delinquent status offenses. Collectively, *Amici* share a deep concern that the Eighth Circuit's decision in this case, if allowed to stand, would subject scores of already vulnerable youth—charged with only status offenses or minor delinquent infractions—to traumatic strip searches with neither probable cause nor individualized suspicion that they may actually be in possession of weapons or contraband. Widely accepted research on adolescent development, missing from the Eighth Circuit's analysis, demonstrates that strip searches can traumatize children—particularly the many detained youth who have histories of abuse.[2] *Amici* join together in support of Petitioners Petition for a *Writ of Certiorari*.

INTRODUCTION

This case involves a question of exceptional importance regarding the constitutionality under the Fourth Amendment of the Minnehaha County Juvenile Detention Center's (JDC) policy to strip-search juveniles arrested on minor violations.[3] The Eighth Circuit's decision in this case

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[1] *Amici* file this brief with the consent of the Petitioners, Smook, *et al*, and with a pending motion for Leave to Appear as *Amicus Curiae* dated February 27, 2006. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief. A list and brief description of all *Amici* appears at Appendix A.

[2] When applying a constitutional principle to adolescents, courts can rely on research about adolescent development introduced by *amici*. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 569 (2005).

[3] These offenses include, among others, petty theft, liquor violations, running away from home, curfew violations, truancy, window peeking, tobacco use, and driving under a revoked license. *Smook v. Minnehaha*

sets a disturbing precedent that departs from controlling case law and widely accepted psychological research. Purportedly based on the longstanding child-protective principles of *parens patriae* and *in loco parentis*, the decision flips these principles on their heads to justify the unwarranted infliction of potentially serious trauma to already vulnerable youth. These principles, centuries old and intended to shield children from harm, are wielded here as a sword to penetrate the most personal zone of privacy—the clothing covering one's body—under circumstances where *adults* could not be so violated. Indeed, the Eighth Circuit's decision conflicts with the decisions of virtually every other circuit that hold strip-searches of adults in similar circumstances unconstitutional. In flouting Supreme Court precedent concerning *parens patriae* and *in loco parentis* as well as Fourth Amendment case law concerning adults, the Court denied youth critical Constitutional protections and their fundamental right to be treated with humanity and dignity[4]—in the guise of protecting them from harm.

County, 340 F. Supp. 2d 1037, 1042 (D.S.D. 2004). Many of these actions would not be criminal at all if committed by an adult.

[4] It is well-established by the international community that children must be treated with respect, humanity and dignity. *See International Covenant on Civil and Political Rights*, Art. 10; *Convention on the Rights of the Child*, Art 37 (all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person). International law is not necessary to *amici's* argument, but these standards indicate consensus within the world community regarding the treatment of children deprived of their liberty. International law has growing importance in domestic courtrooms. Although the U.S. has ratified some international covenants, which mandate treatment of youth with respect and humanity, *see, e.g. International Covenant on Civil and Political Rights*, even when international law does not place binding authority on U.S. law, it remains an influential force when considering constitutional and human rights questions. This Court has explained that "it does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage and freedom." *Roper v. Simmons*, 543 U.S.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESTORE THE PROTECTIONS OF THE FOURTH AMENDMENT TO SOCIETY'S MOST VULNERABLE YOUTH.

"The fundamental command of the Fourth Amendment is that all searches and seizures be reasonable. . . ." *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). Where the requirement of a warrant and probable cause are not appropriate, and therefore not required, courts must balance the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

The Courts of Appeals are in agreement that a government's legitimate goal in maintaining institutional security does not justify the strip search of adults arrested for misdemeanors without individualized suspicion of wrongdoing or possession of contraband.[5] The Eighth Circuit, following the Second Circuit, relied on school search cases to assert that the concept of "special needs" dictates that children

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551, 574-78 (2005). This Court has twice stated that international authority and foreign laws are "instructive" and embody the "opinion of the world community" and therefore serve as a source of "respected and significant confirmation for the court's own conclusions." *Roper*, 543 U.S. at 578; *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

[5] *See Chapman v. Nichols*, 989 F.2d 393, 395-97 (10th Cir. 1993); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986); *Stewart v. Lubbock County, Texas*, 767 F.2d 153, 156-67 (5th Cir. 1985); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614, 615 (9th Cir. 1984), *overruled by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) on other grounds; *Hill v. Bogans*, 735 F.2d 391, 394-95 (10th Cir. 1984); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981).

detained for minor offenses may be subjected to searches which could not be conducted on adults. *Smook v. Minnehaha County*, 457 F.3d 806, 810 (8th Cir. 2006) *citing Board of Educ. v. Earls*, 536 U.S. 822, 829-30 (2002). This analysis misstates the law.

A determination of special needs is a threshold finding that allows a court to bypass the warrant and probable cause requirement – nothing more. Thus, a search may continue in the absence of a warrant and probable cause "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *T.L.O.*, 469 U.S. at 351 (J. Blackmun concurring). Although searches absent individualized suspicion can sometimes be constitutional, *see, e.g., Board of Educ. v. Earls*, 536 U.S. 822 (2002), the determination that a case fits the "special needs" exception to the warrant requirement does not automatically eliminate the requirement of individualized suspicion. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868 (1987); *T.L.O.*, 469 U.S. at 342.

At issue here is the constitutionality of a suspicionless search. The category of constitutionally permissible suspicionless searches is "closely guarded." *Chandler v. Miller*, 520 U.S. 305, 309 (1997). "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985). Indeed, the majority of suspicionless tests upheld by this Court have been drug tests in which the Court has characterized the intrusion of privacy as minimal or even "negligible." *See, e.g., Earls*, 536 U.S. 822; *Vernonia Dist. 47J v. Acton*, 515 U.S. 646 (1995), *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

This Court has upheld the serious intrusion of a strip search without individualized suspicion only in a case involving exceptional security concerns. *See Bell v. Wolfish*, 441 U.S. 520 (1979).[6]

The search at issue does not meet this test. A strip-search cannot be called a "minimal" intrusion. Indeed, a strip search is often not only intrusive, but also traumatic. Because Smook and the other children in her class were brought in on minor offenses such as curfew violations, and because many of them, like Smook, were never intermingled in the detention center population but rather picked up by their parents and driven home, the exceptional institutional security interests that would be needed to justify such a search were absent. Moreover, the doctrines of *in loco parentis* and *parens patriae* are not relevant to this context, and therefore do not affect the balancing test.

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[6] *Bell* found constitutional a strip search of adults confined post-arraignment. The population included those for whom "no other less drastic means" could reasonably ensure their presence at trial as well as "convicted inmates who are awaiting sentencing or transportation to federal prison or who are serving generally relatively short sentences. . . convicted prisoners who have been lodged at the facility under writs of habeas corpus *ad prosequendum* or *ad testificandum* issued to ensure their presence at upcoming trials, witnesses in protective custody, and persons incarcerated for contempt." *Id.* at 524. The Court concluded that an adult detention facility was "a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record. . .and in other cases." *Id.* at 559 (internal citations omitted). The only other suspicionless special needs searches this Court has upheld beyond the drug tests mentioned above involve lesser intrusions (such as apartment or pat-down searches) of those with diminished expectations of privacy resulting from their status as convicted criminals under state supervision. *See United States v. Knights*, 534 U.S. 112 (2001); *Samson v. California*, 126 S.Ct. 2193 (2006).

A. The Intrusion Into Personal Privacy Caused by a Strip Search is Even More Severe for Children than for Adults.

A strip search is a severe intrusion into personal privacy. *U.S. v. Mendenhall,* 446 U.S. 544, 574 (U.S.1980). Being forced to strip in front of a stranger can be frightening, demeaning and degrading. *See Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996); *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993) (strip searches are "terrifying"); *Justice v. Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992) ("The experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state…can only be seen as thoroughly degrading and frightening….[S]uch a search upon an individual detained for a lesser offense is quite likely to take that person by surprise, thereby exacerbating the terrifying quality of the event."); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1446 (9th Cir. 1989) (strip searches produce "feelings of humiliation and degradation"); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission"); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir.1982) ("[a] strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience.)[7]

[7] Whether an individual is forced to remove all of his or her clothing, or allowed to keep his or her undergarments on is irrelevant. The written JDC Policy requires removal of all the juvenile's clothing. The fact that one plaintiff was permitted to leave on her undergarments does not make the search any more reasonable. *See Justice*, 961 F.2d. at 191 (describing the severe intrusion of a search in which a juvenile was forced to strip down to her underwear).

Strip searches are perceived as particularly intrusive by children and teenagers.[8] *See, e.g., Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993) (strip search was particularly intrusive on 16-year-old, because that is the "age at which children are extremely self-conscious about their bodies"); *Doe v. Renfrow*, 631 F.2d 91, 93 (7th Cir. 1980) (strip search of 13-year-old was a "violation of any known principle of human decency"). *See also Thomas ex. rel. Thomas v. Roberts*, 261 F.3d 1160, 1168 (11th Cir. 2001), *vacated by* 536 U.S. 953 (2002) on other grounds (strip searches represented a serious intrusion on the rights of the children); *Jenkins by Hall v. Talladega City Bd. of Educ.*, 95 F.3d 1036, 1044 (11th Cir. 1996) ("the perceived invasiveness and physical intimidation intrinsic to strip searches may be exacerbated for children"). Because "youth...is a...condition of life when a person may be most susceptible...to psychological damage," *Eddings v.*

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[8] Such searches are contradictory to all international standards regarding treatment of children deprived of their liberty and children accused of crimes. State parties to the United Nations Convention on the Rights of the Child (State parties to the Convention on the Rights of the Child include all countries in the world community aside from The United States and Somalia. The U.S. has signed the Convention, but has not yet ratified it. Although it is not binding on U.S. law, as demonstrated by this Court, *supra* n. 4, it is instructive and persuasive. Almost every country in the world recognizes the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforce the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. *U.N. Convention on the Rights of the Child*, Art. 40; *See also United Nations Rules for Protection of Juveniles Deprived of their Liberty*, Part D, Sec. 3 (Juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity). The use of strip searches on children being held for minor offenses does not treat them with such respect.

Oklahoma, 455 U.S. 104, 115 (1982), "[c]hildren are especially susceptible to possible traumas from strip searches." *Flores v. Meese*, 681 F. Supp. 665, 667 (C.D. Cal. 1988), *rev'd on other grounds*, 507 U.S. 292 (1993).

Research in adolescent development supports the conclusion that strip searches impact young people even more severely than adults. Because adapting to physical maturation is central to the psychological task of adolescence, teenagers tend to be more self-conscious about their bodies than those in other age groups. Anne C. Peterson & Brandon Taylor, *The Biological Approach to Adolescence: Biological Change and Psychological Adaptation, Handbook of Adolescent Psychology* 144 (Joseph Adelson ed., 1980); Edward Clifford, *Body Satisfaction in Adolescence, in Adolescent Behavior and Society: A Book of Readings* 53 (Rolf E. Muuss ed., 3d ed. 1980). With the onset of puberty, normal teenagers begin to view their bodies critically and compare them to those of their peers and their ideals, making adolescents particularly vulnerable to embarrassment. *F. Phillip Rice & Kim Gale Dolgin, The Adolescent: Development, Relationships and Culture* 173 (10th ed. 2002). Surveys confirm a high degree of anxious body preoccupation and dissatisfaction among adolescents. Peterson & Taylor, *infra*, at 144-45. This body criticism is part and parcel of the major task of adolescence: obtaining autonomy from the family and "assum[ing] the role of an adult in society." William A. Rae, *Common Adolescent-Parent Problems, in Handbook of Clinical Child Psychology* 555 (C. Eugene Walker and Michael C. Roberts, eds., 2d ed. 1992).

Accordingly, teenagers have a heightened need for personal privacy. Gary B. Melton, *Minors and Privacy: Are Legal Concepts Compatible?*, 62 Neb. L. Rev. 455, 488 (1983); Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality and Juvenile Delinquency*, 11 Geo. J. Legal Ethics 509 (1998). For an adolescent, privacy is a "marker of independence and self-

differentiation." Melton, *supra,* at 488. If the child's privacy is threatened, the resulting stress can seriously undermine the child's self-esteem. See also Rae, *supra* at 561 (noting the importance of confidentiality when working with adolescents) and Rice, *supra* at 180 (noting the negative impact of stress upon self-esteem and adolescent development). As the courts have recognized in many cases, including those cited above, strip searches present an extreme threat to bodily privacy.

As a result of these developmental issues, strip searches have a more serious impact on children than on adults; in fact, "a child may well experience a strip search as a form of sexual abuse." Steven F. Shatz, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 12 (1991).

> Children, even at very early ages, understand the concept that certain parts of their body are 'private.' Child abuse education programs underscore this understanding, telling children: 'No one who is bigger or older than you should look at or touch your private parts, nor should you look at or touch their private parts.' . . . Thus, the strip search—being compelled to expose one's private parts to an adult stranger who is obviously not a medical practitioner—is offensive to the child's natural instincts and training.

Shatz, *supra* at 13. Strip searches can seriously traumatize children, leading them to experience years of anxiety, depression, loss of concentration, sleep disturbances, difficulty performing in school, phobic reactions, and lasting emotional scars. See Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. Cal. L. Rev. 921, 929 (1997) (describing lasting and debilitating psychological effects of school's strip search of a student). Consequently, any strip search, no matter the underlying

justification, has a debilitating impact on children that clearly does not account for the child's best interests. [9] A strip search is even more deplorable where, as in the case at bar, it is employed against a minor who has committed no crime.

B. The Nature and Immediacy of the Governmental Concern at Issue Does Not Outweigh the Severe Intrusion on the Youths' Privacy

Neither the government's articulated justification of detecting weapons or contraband nor its justification of detecting abuse constitutes an exceptional safety need sufficient to justify such a severe privacy intrusion.

The Eighth Circuit suggested that the strip search policy was justified because it could lead to the discovery of weapons that a child could use to harm herself or others. This reasoning is unavailing. When individuals are arrested for minor non-violent offenses, there is "little reason to believe that" they "will conceal weapons or contraband." *Masters v. Crouch*, 872 F.2d 1248, 1254 (6th Cir. 1989). Thus, suspicionless searches of such individuals are unreasonable. *See, e.g., Chapman v. Nichols*, 989 F.2d 393 (10th Cir. 1993) (security interests cannot justify a strip search of women brought in for driving with suspended licenses); *Hill v. Bogan*, 735 F.2d 391, 394 (10th Cir. 1984) (if an offense is not one "associated with the concealment of weapons or contraband in a body cavity," a strip search is not reasonable); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983) (search of a woman arrested on misdemeanor charges who has been patted down bore no "relationship to security needs so

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[9] International law supports that the consequences to children should be of primary concern when the juvenile justice system implements procedures that can result in harm. *See United Nations Declaration of the Rights of the Child*, Preamble and Principle 2 ("Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection ... [t]he child shall enjoy special protection [and in] the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.").

that, when balanced against plaintiffs-appellees privacy interests, the searches cannot be considered 'reasonable'"); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981) (strip search of woman arrested for driving while intoxicated bore no discernable relationship to security concerns and "cannot be constitutionally justified simply on the basis of administrative ease"). The reasoning of these cases, drawn from situations involving adult misdemeanants, is no less apt in the cases of youths arrested for minor offenses.

Additionally, by definition, status offenses such as truancy, curfew violations and underage drinking, do not include any violent conduct. Status offenses are considered illegal only because the person committing them is a juvenile.[10] Thus, even more than the adult taken into custody on a minor offense, a juvenile brought in on a status offense should not be expected to be concealing weapons or contraband. Indeed, there is no substantiated correlation between incidences of curfew violations and other violent crime to support a concern that youths detained for status offenses are likely to be harboring weapons. *See Males, M. & Macallair, D., An Analysis of Curfew Enforcement and Juvenile Crime in California*, West. Crim. Review 1 (1999); *Adams, K., The Effectiveness of Juvenile Curfews at Crime Prevention*, 587 Annals Am. Acad. Pol. & Soc. Sci. 136 (2003) (finding jurisdictions with juvenile curfew laws do not experience lower crime levels, accelerated youth crime reduction or lower rates of violent juvenile death than jurisdictions without curfew laws).

The justification for a strip search is even more unfounded here, where Smook was never confined to the detention center or intermingled with other children, but remained in the waiting area until her mother picked her up to

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[10] As a result, it is widely believed across the world community that status offenses should not be criminalized. *United Nations Guidelines for the Prevention of Juvenile Delinquency – Riyadh Guidelines* at 5, 56.

drive her home. Where a detainee is not intermingled significantly with the general population, courts have found that strip searches are not justified. *Swain v. Spinney*, 117 F.3d 1, 8 (1st Cir. 1997); *Logan v. Shealy*, 660 F.2d at 1013. Thus, it is an "easy" conclusion that an adult should not be strip-searched until the determination is made as to whether she will be released on her own recognizance. *Ward v. San Diego County*, 791 F.2d 1329 (9th Cir. 1986). A child, similarly, should not be strip-searched if she is simply waiting to be released and driven home by her parents.

The Eighth Circuit itself has recognized that an adult brought into custody on suspicion of a minor non-violent offense must not be strip-searched. *Jones*, 770 F.2d at 739.[11] The court justified its departure from established Fourth Amendment jurisprudence in this case on the basis of the state's duty to protect children in its care. Although *Amici* agree that detention centers have a duty to protect juvenile detainees in their care from harm, adults are entitled to the same duty in adult correctional facilities. *See, e.g., Farmer v. Brennan*, 511 U.S. 825 (1994); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *See also Jones*, 770 F.2d at 742 (recognizing that adult correction officials are, in part, responsible for the safety of their charges); *A.M. v. Luzerne County Juvenile Det. Ctr.*, 372 F.3d 572, 585 n.3 (3d Cir. 2004) (observing that "a juvenile detention center is comparable to a prison, which...has a duty to care for and protect its inmates"). Thus, the state's "considerations regarding contraband are the same whether the detainee is a juvenile or an adult." *Justice*, 961 F.2d at 193.[12] If the state's interest in protecting its adult charges from weapons does not outweigh the adults' privacy

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[11] Of course, weapons and other dangerous instruments may be discovered with the use of metal detectors or other less intrusive searches.

[12] That a search based on individualized suspicion would be feasible further undermines the argument that a suspicionless test is constitutional. *See, e.g., Chandler v. Miller*, 520 U.S. at 321; *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 660 (1989)

interest in being free from strip searches, it cannot logically outweigh its similarly-situated juvenile charges' privacy interest, because the controlling "considerations ... are the same" for both groups. *Id.*

The Eighth Circuit also concluded that the state's duty of care to children in its custody required JDC staff to investigate any physical abuse of detainees, and that strip searches were necessary to discover evidence of physical abuse. *Smook*, 457 F.3d at 810-11. This Court has held that, in determining the nature of the governmental concern, courts should assess the "efficacy of the means for addressing the problem." *Vernonia*, 515 U.S. 646, 663. Thus, a search that is not well-designed to effectuate its purpose weighs against a finding of constitutionality. *See Chandler v. Miller*, 520 U.S. 305, 319 (1997). In the present case, there was no evidence to suggest that staff members ever made referrals of child abuse or neglect as a result of the searches. *Smook v. Minnehaha County*, 340 F. Supp. 2d 1037, 1045 (D.S.D. 2004). More importantly, as described above, if a child has been abused, such a search would be particularly likely to traumatize him or her.[13] A search that is both ineffective at detecting abuse *and* likely to traumatize children cannot be constitutional.[14]

II. THE EIGHTH CIRCUIT'S INTERPRETATION OF THE *IN LOCO PARENTIS* DOCTRINE CONFLICTS WITH SUPREME COURT PRECEDENT.

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[13] Because trauma experienced at a young age can have particularly severe consequences, Gordon R. Hodas, *Responding to Childhood Trauma: The Promise and Practice of Trauma Informed Care*, Pennsylvania Office of Mental Health and Substance Abuse Services (February, 2006) at 9, many children will be highly vulnerable to the stress of a strip search because of histories of abuse, but display no physical signs of abuse at the time of the search.

[14] Moreover, allowing a detention center to search a child for evidence of abuse runs counter to the constitutional right of parents. *Tenenbaum v. Williams*, 193 F.3d 581, 597-99 (2d Cir. 1999).

The Eighth Circuit's decision in this case reasons that children placed in detention for curfew or other minor violations are in the protective custody of the state under the *in loco parentis* doctrine, and that the state may therefore strip search them without probable cause for their own protection. This rationale fundamentally misunderstands that doctrine for two reasons. First, the *in loco parentis* doctrine does not generally apply to the state. Second, strip searches of juveniles detained on minor offenses do not serve a child protective function.

The Eighth Circuit's decision relied heavily on the opinion of the Second Circuit in *N.G. v. Connecticut*, and quoted that court's suggestion that:

> [w]here the state is exercising some legitimate custodial authority over children, its responsibility to act in the place of parents (*in loco parentis*) obliges it to take special care to protect those in its charge, and that protection must be concerned with dangers from others and self-inflicted harm.

N.G. v. Connecticut, 382 F.3d 225, 232 (2d Cir. 2004). Both the Eighth and Second Circuit opinions fundamentally misunderstand the *in loco parentis* doctrine. The term *in loco parentis* refers to someone who is "charged, factitiously, with a parent's rights, duties, and responsibilities." Black's Law Dictionary (6 Ed. 1990) 787. The doctrine generally confers broad parental authority over the child to the person *in loco parentis*, and that person intentionally and voluntarily accepts the duties, responsibilities, and rights of a parent. *Miller v. United States*, 123 F.2d 715, 717 (8th Cir. 1941), *rev'd on other grounds*, 317 U.S. 192 (1942). The doctrine is reserved for individuals acting in the legal place of parents, and in a custodial role, and is not "designed for teachers, coaches, scout leaders, or any other persons who might temporarily have some disciplinary control over a child." *State v. Noggle*,

615 N.E.2d 1040, 1042 (Ohio 1993) (emphasis added). Accord *Powledge v. U.S.*, 193 F.2d 438, 441 n.5 (5th Cir. 1951) (analogizing persons *in loco parentis* to natural parents) and *U.S. v. Floyd*, 81 F.3d 1517, 1524 (10th Cir. 1996).

In short, the Eighth Circuit's decision in this case applies the *in loco parentis* doctrine far beyond its accepted context. This Court has made clear that when a teacher or public school official represents the state by carrying out searches and other disciplinary functions, he or she is not acting *in loco parentis* and thus is not immune from the strictures of the Fourth Amendment. *T.L.O.*, 469 U.S. at 336-37.[15] Similarly, because staff members at a juvenile detention center are agents of the state carrying out law enforcement obligations, they may not rely on the *in loco parentis* doctrine to justify their searches. The doctrine is particularly inapposite in the case of children such as Smook, who, like many other juveniles arrested on minor offenses, was never admitted into the secure detention facility, but was merely awaiting her parents' arrival when the staff conducted the search.

Both the Second Circuit decision in *N.G.* and the Eighth Circuit's decision in this case apply the doctrine, without foundation, to juvenile detention facilities and their employees, apparently because both courts have conflated the broad parental authority conferred by the *in loco parentis* doctrine with the narrower power retained by the State in its role as *parens patriae*, which applies only when normal parental authority has failed. *Cf. Schall v. Martin*, 467 U.S. 253, 265 (1984) (noting that "the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's '*parens patriae* interest in preserving and promoting the welfare of the child'").

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[15] In *T.L.O.*, the Supreme Court explicitly rejected the notion that school personnel performing a search are acting *in loco parentis* and therefore not subject to the limits of the Fourth Amendment. *T.L.O.*, 469 U.S. at 336-37.

The doctrine of *parens patriae* does not justify the strip search at issue. Historically, the state's authority as *parens patriae* was only invoked upon the death of the child's natural parent, or upon a showing that the parent was unfit or unable to care for his or her child. *DeBacker v. Brainard*, 396 U.S. 28, 36 (1969) (the state may act if the child's parents or guardian are "unable or unwilling to do so"); *See also Prince v. Massachusetts*, 321 U.S. 158 (1944); *Vidal v. Girard's Ex'rs*, 43 U.S. 127, 168 (1844) (*parens patriae* allowed the state to take care of the "sick, the widow, and the orphan"); *Ex Parte Crouse*, 4 Whart. 9, 10 (Pa. 1839) (State may act as *parens patriae* where parents are "unequal to the task of education, or unworthy of it," or "when they are incompetent or corrupt"). This concept – that the State cannot overstep the rights of parents – infuses the Court's jurisprudence on *parens patriae*. Children "are assumed to be subject to the control of their parents, and *if parental control falters*, the State must play its part as *parens patriae*." *Schall v. Martin*, 467 U.S., at 265 (1984) (emphasis added); *see also Santosky v. Kramer*, 455 U.S. 745, 767 n. 17 (1982) ("Any *parens patriae* interest in terminating the natural parents' rights arises only at the dispositional phase, *after* the parents have been found unfit").

Moreover, the state's power under the *parens patriae* doctrine to protect children may be used to "advance only the best interests of the incompetent individual involved and not attempt to further other objectives, deriving from its police power, that may conflict with the individual's welfare." *Developments in the Law – The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1199 & n.14 (1980). The claim of acting in a child's interest cannot justify violating the child's rights. *Kent v. United States*, 383 U.S. 541, 555 (1966)

("[T]he admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness.").[16]

In particular, the use of the doctrine in the criminal or juvenile justice context is highly suspect. As this Court has explained, the term *parens patriae* historically

> proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was...used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence.

In re Gault, 387 U.S. 1, 16 (1967). Thus, this Court has held that while the State has a legitimate interest in "protecting both the juvenile and society from the hazards of pretrial crime," due process requires that before detaining a juvenile, the State must put in place procedures that "provide sufficient protection against erroneous and unnecessary deprivations of liberty." *Schall*, 467 U.S. at 274. More specifically, the state may not conduct warrantless strip searches of children even to investigate claims that the children being strip-searched have been abused or neglected, absent prior judicial approval.[17]

Blanket policies providing for suspicionless strip searches extend far beyond what the Fourth Amendment and Due Process allow. This is especially clear in cases where the

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[16] Indeed, "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards." *In re Winship*, 397 U.S. 358, 365-66 (1970).

[17] *See, e.g., Good v. Dauphin County Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989); *Roe v. Texas Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 407-08, (5th Cir. 2002); *Calabretta v. Floyd*, 189 F.3d 808, 817-18 (9th Cir. 1999); *Franz v. Lytle*, 997 F.2d 784, 791 (10th Cir. 1993).

special need is not "'divorced from the state's general interest in law enforcement,'" *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001), there is no close and substantial relationship between the intrusiveness of the search and the governmental need for the search, *United States v. Lifshitz*, 369 F.3d 173, 186 (2d Cir. 2004), and the search itself is likely to traumatize rather than protect the child. Here, the state's general interest in law enforcement is not of the immediacy that would legitimately justify an intrusive and traumatic strip search for children being detained for short amounts of time.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Juvenile Law Center, *et al.*, respectfully request that this Court grant the petition for a *writ of certiorari*.

Respectfully Submitted,

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APPENDIX A

IDENTITY OF *AMICI CURIAE*

Organizations

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

Children's Law Center of Minnesota (CLC) opened for operation in 1995 and is the only legal center for children in Minnesota. CLC is a nonprofit organization whose mission is to promote the rights and interests of all children – especially children of color and children with disabilities – in the judicial, child welfare, health care and education systems. CLC carries out its mission by providing direct representation for children and by advocating and participating in statewide efforts to reform and improve the child protection and juvenile

justice systems. CLC participates in statewide committees such as the Children in Need of Protection or Services Public Defender Workgroup that examined and made recommendations for the state-wide representation of children and parents in abuse and neglect proceedings and the Children's Justice Initiative that recommends system change to change the lives of children in foster care. CLC also participates nationally in the American Bar Association Section of Litigation Children's Rights Litigation Committee Working Group and the National Children's Law Network that is forging a national agenda for the well being of children in foster care and delinquency proceedings. Children have rights and legal protections, but they are not self-supporting; they need someone, first, to help them understand how their lives can be better and, second, to speak effectively on their behalf and promote their important interests. The services that CLC provides center on the rights of children to have a voice in their own future and to be secure in their person and environment. CLC represents children who have been physically or sexually abused or neglected and are in the foster care system. A large number of these children are also brought into detention as status offenders because of running away and truancy. CLC joins this brief because of the critical public policy issue at stake for the children it serves.

The **Justice for Children Project** is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. Begun in January 1998, the Project's mission is to explore ways in which the law and legal reform may be used to redress systemic problems affecting children. The Justice for Children Project has two primary components: original research and writing in areas affecting children and their families, and direct legal representation of children and their interests in the

courts. Through its scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children's rights advocates. By its representation of individual clients through the Justice for Children Practicum and through its amicus work, the Justice for Children Project strives to advance the cause of children's rights in delinquency, status offense, abuse, neglect, and other legal proceedings affecting children's interests.

The **Barton Child Law and Policy Clinic** at Emory University School of Law was founded in March 2000. Barton was originally established to address the need in Georgia for an organization dedicated to effecting systemic policy and process changes for the benefit of the children in Georgia's child welfare system. In 2006, Barton was expanded to include a direct representation clinic known as the **Juvenile Defender Clinic** (JDC) for those children charged with delinquent and unruly offenses.

The JDC provides a clinical experience for third year law students in the juvenile court arena. The focus of the clinical experience is to provide quality representation to children by ensuring fairness and due process in their court proceedings and by ensuring that courts make decisions informed by the child's educational, mental health and family systems objectives. The JDC believes that children should be treated appropriate to their developmental status and wherever possible in their home environment. JDC believes that courts should not be used as a broker for those services that should be systematically provided by schools, medical professionals and family support systems.

The JDC at Barton is a clinic supported in its entirety by the Emory University School of Law. Legal services are provided at no cost to its clients.

The **Center for Children's Law and Policy** (CCLP) is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP capitalizes on its Washington, DC location by working on juvenile justice and education reform efforts in DC, Maryland, and Virginia; partnering with other Washington-based system reform and advocacy organizations such as the Justice Policy Institute, National Juvenile Defender Center, and Campaign 4 Youth Justice; engaging in legislative advocacy with Congress; and associating with major Washington law firms which provide assistance on a pro bono basis. CCLP also works in other states and on national initiatives such as the John D. and Catherine T. MacArthur Foundation's Models for Change initiative, which promotes juvenile justice reforms, and the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative, which aims to reduce the use of locked detention and ensure safe and humane conditions of confinement for children.

The **Center on Children and Families** (CCF) at Fredric G. Levin College of Law is based at University of Florida, the state's flagship university. CCF's mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered,

evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Child Welfare Clinic and Gator TeamChild juvenile law clinic.

The **Northwestern University School of Law's Bluhm Legal Clinic** has represented poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The **Children and Family Justice Center** (CFJC) was established in 1992 at the Clinic as a legal service provider for children, youth and families and a research and policy center. Six clinical staff attorneys currently work at the CFJC, providing legal representation and advocacy for children in a wide variety of matters, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum, and appeals. CFJC staff attorneys are also law school faculty members who supervise second- and third-year law students in the legal and advocacy work; they are assisted in this work by the CFJC's social worker and social work students.

The **Children & Youth Law Clinic** (CYLC) is an in-house legal clinic, staffed by faculty and students at the University of Miami School of Law, which advocates for the rights of children in abuse and neglect, delinquency and other legal proceedings. Founded in 1995, the CYLC has appeared as amicus curiae in numerous federal and state court cases implicating significant due process and therapeutic interests of children in state custody. The CYLC has pioneered the use of "therapeutic jurisprudence" in its advocacy for children in dependency, mental health, delinquency, and other court proceedings. Therapeutic jurisprudence is a field of social inquiry with a law reform agenda, which studies the ways in

which legal rules, procedures, and the roles of legal actors produce therapeutic or anti-therapeutic consequences for those affected by the legal process. The CYLC works to ensure that children are treated with dignity and respect by public agencies charged with their care and custody, and by the courts charged with the oversight of the agencies providing care to children in their custody. We believe that public policy should further the therapeutic interests of children, minimize anti-therapeutic consequences of the legal process, assure their fair treatment, and promote the rehabilitative purposes of the juvenile justice system.

The ***Civitas* ChildLaw Center** is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its Child and Family Law Clinic, the ChildLaw Center also routinely provides representation to child clients in juvenile delinquency, domestic relations, child protection, and other types of cases involving children. The Child Law Center maintains a particular interest in the rules and procedures regulating the legal and governmental institutions responsible for addressing the needs and interests of court-involved youth.

Founded in 1997, the **Juvenile Justice Project of Louisiana** (JJPL) has established itself as a partner in efforts to reform Louisiana's juvenile justice system. We have dedicated ourselves to advocating not only for more effective, less expensive alternatives to incarceration, but also for the zealous and effective representation of children in the juvenile and criminal justice systems. JJPL was founded on the recognition that children and adolescents are fundamentally

different from adults and, as such, require developmentally appropriate interventions and advocacy. The manner in which the judicial system responds to young people in crisis has been a central focus of JJPL. We believe that children must be afforded essential due process protections and that such protections necessarily include a consideration of their developmental capacities and limitations. This is particularly the case where a child is likely to feel intimidated by authority figures. Given the ways in which young people are especially susceptible to police questioning and interrogations, a juvenile must have meaningful access to counsel to ensure his rights are protected. JJPL is committed to ensuring that children and youth accused of wrongdoing receive the appropriate protections of the law.

The **Kids First Law Center** is a nonprofit public interest organization for children in Cedar Rapids, Iowa. Kids First opened in January 2005 and provides free legal counsel to children in high-conflict custody and divorce cases. Kids First focuses on the needs and rights of children placed in the middle of conflict. The organization strives to make children's voices heard in the court system. We believe judges and attorneys should seek to understand situations from the child's perspective. Adults should recognize that children who have been victims of abuse should be treated in ways that do not re-victimize them.

The **Mid-Atlantic Juvenile Defender Center** (MAJDC) is a multi-faceted juvenile defense resource center that has served the District of Columbia, Maryland, Puerto Rico, Virginia and West Virginia since 2000. We are committed to working within communities to ensure excellence in juvenile defense and promote justice for all children. MAJDC promotes research and policy development

throughout the region by conducting state-based assessments of juvenile indigent defense delivery systems. Following the assessment, MAJDC staff work to ensure the report is used to educate the public about issues related to the delivery of indigent defense services for juveniles and assists the public defender systems in responding to assessment recommendations. MAJDC also responds to the needs of juvenile defenders by coordinating training programs, providing technical assistance and maintaining a list-serve of juvenile defenders to respond to defender questions. MAJDC is a 501 (c)(3) non-profit organization.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. It also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

The **New England Juvenile Defender Center, Inc.** was created in 2000 to ensure excellence in juvenile defense and promote justice for children in the juvenile justice systems

of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. The Center focuses primarily on supporting defenders to provide the best possible services to court-involved children and to ensure that the juvenile justice systems in New England treat children like children and provide them with real opportunities for care and treatment where appropriate. The Center has also created a Juvenile Impact Litigation Fund to support solo practitioners and organized groups of attorneys to challenge conditions of confinement in the region. The NEJDC is a non-profit public interest organization.

The **Northeast Regional Juvenile Defender Center** (NRJDC) is dedicated to increasing access to justice for and the quality of representation afforded to children caught up in the juvenile and criminal justice systems. Housed jointly at Rutgers Law School - Newark and the Defender Association of Philadelphia, the NRJDC provides training, support, and technical assistance to juvenile defenders in Pennsylvania, New Jersey, New York, and Delaware. The NJRDC also works to promote effective and rational public policy in the areas of juvenile detention and incarceration reform, disproportionate confinement of minority children, juvenile competency and mental health, and the special needs of girls in the juvenile justice system.

The **Office of the Juvenile Defender** (OJD) in Vermont is an office within the Office of the Defender General. The Office of the Defender General is responsible for providing public defender representation to qualified Vermont citizens. The OJD was established to provide ongoing post-dispositional legal representation to those children and youth who were the subject of abuse, neglect or delinquency petitions in Family Court, were represented by

public defenders statewide, and, as a result of those proceedings, were placed in the custody of the Commissioner of the Department for Families and Children (DCF), Vermont's child welfare agency. The OJD provides legal representation to its clients at caseplan review meetings, various administrative hearings and when they are placed at the Woodside Juvenile Rehabilitation Center, which houses Vermont's sole juvenile detention center. The OJD pays particular attention to those children who are placed at the juvenile detention center and endeavors to ensure that their Constitutional rights are protected and that they are treated fairly by DCF and receive appropriate services.

The **Pacific Juvenile Defender Center** (PJDC) is a regional affiliate of the National Juvenile Defender Center. PJDC is a collaborative effort of the San Francisco Office of the Public Defender and the Center on Juvenile and Criminal Justice. The PJDC is housed at Legal Services for Children. The Defender Center provides support, training and technical assistance for juvenile defenders throughout California and Hawaii. It is the mission of the Defender Center to improve the quality of juvenile defense in our region and ensure that juveniles are provided with holistic representation that meets their needs.

The **San Francisco Public Defender's Office** provides legal representation per year to approximately 1,400 juveniles, aged 10-18, who are arrested and charged with delinquent offenses. The majority of the juvenile clients represented by the office come from difficult family circumstances and live in dangerous and poverty stricken neighborhoods and are in need of legal and social services. Our juvenile clients are a very vulnerable population with needs that are substantial and involve multi-systems

collaborations such as with special education, mental health, dependency and immigration. The goal of the juvenile justice system is very different form the adult system. We recognize the need to treat children going through adolescence very differently than adults.

The **Southern Juvenile Defender Center** (SJDC) works to ensure excellence in juvenile defense and secure justice for children in delinquency and criminal proceedings in the southeastern United States. SJDC provides training and resources to juvenile defenders, and advocates for systemic reforms designed to give children the greatest opportunities to grow and thrive. Through public education and advocacy, SJDC encourages attorneys and judges to rely upon scientific research concerning adolescent brain development in cases involving youthful defendants. SJDC is based at the Southern Poverty Law Center ("SPLC") in Montgomery, Alabama. Founded in 1971, SPLC has litigated numerous civil rights cases on behalf of incarcerated children and other vulnerable populations.

The **Women's Law Project** (WLP) is a non-profit legal advocacy organization in Pennsylvania. Founded in 1974, the WLP works to advance the legal and economic status of women through litigation, public policy development, education and one-on-one counseling. The WLP is committed to protecting the health and well-being of young women. Throughout its existence, the WLP has played a leading role in the struggle to protect women's privacy, safety, and treatment under the law in the context of health care decisions and law enforcement's response to sexual assault and domestic violence. The WLP served as co-counsel for plaintiffs in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), *Planned Parenthood v. Casey*, 505 U.S. 833

(1992), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). The Women's Law Project has also worked on a variety of projects to improve the conditions of women prisoners across the state of Pennsylvania, starting with litigation on behalf of women prisoners in the State Correctional Institution at Muncy that drastically altered the way women were incarcerated in Pennsylvania (*Beehler v. Jeffes*, 664 F. Supp. 931 M.D. Pa. 1986) and continuing to the present day.

Individuals

Professor Emily Buss is Professor of Law and Kanter Director of Policy Initiatives at the University of Chicago Law School research and scholarship is in the area of children's and parental rights. Recent articles include *Constitutional Fidelity Through Children's Rights*, 2004 Supreme Court Review 355, which demonstrates the need to account for child and adolescent development in applying constitutional rights to minors.

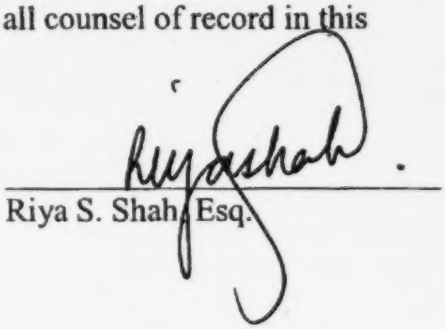
Professor Barry Feld is Centennial Professor of Law, University of Minnesota Law School. He received his B.A. from the University of Pennsylvania; his J.D. from University of Minnesota Law School; and his Ph.D. in sociology from Harvard University. He has written eight books and about seventy law review and criminology articles and book chapters on juvenile justice with a special emphasis on serious young offenders, procedural justice in juvenile court, adolescents' competence to exercise and waive *Miranda* rights and counsel, youth sentencing policy, and race. Feld has testified before state legislatures and the U. S. Senate, spoken on various aspects of juvenile justice administration to legal, judicial, and academic audiences in the United States

and internationally. He worked as a prosecutor in the Hennepin County (Minneapolis) Attorney's Office and served on the Minnesota Juvenile Justice Task Force (1992 -1994), whose recommendations the 1994 legislature enacted in its revisions of the Minnesota juvenile code. Between 1994 and 1997, Feld served as Co-Reporter of the Minnesota Supreme Court's Juvenile Court Rules of Procedure Advisory Committee.

Professor Wallace Mlyniec is the Associate Dean of Clinical Education and Public Service Programs, Lupo-Ricci Professor of Clinical Legal Studies, and Director of the Juvenile Justice Clinic at Georgetown University Law Center. He teaches courses in family law and children's rights and assists with the training of criminal defense and juvenile defense fellows in the Prettyman Legal Internship Program. He is the author of numerous books and articles concerning criminal law and the law relating to children and families. Wallace Mlyniec received a Bicentennial Fellowship from the Swedish government of study their child welfare system, the Stuart Stiller Award for public service, and the William Pincus award for contributions to clinical education. He holds his B.S. from Northwestern University and his J.D. from Georgetown University.

CERTIFICATE OF SERVICE

I, Riya S. Shah, Esq., do hereby certify this 27th day of February, pursuant to Supreme Court Rule 29, that three copies of the Motion of Juvenile Law Center for Leave to File and Amicus Curiae Briedf in Support of Petition for a Writ of Certiorari and Brief of Juvenile Law Center in Support of Petition for a Writ of Certiorari in the case of *Smook v. Minnehaha County*, Docket number 06-1034, have been served, via first class mail on all counsel of record in this appeal as follows:



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